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A PUBLICATION OF DELAWARE BAR FOUNDATION

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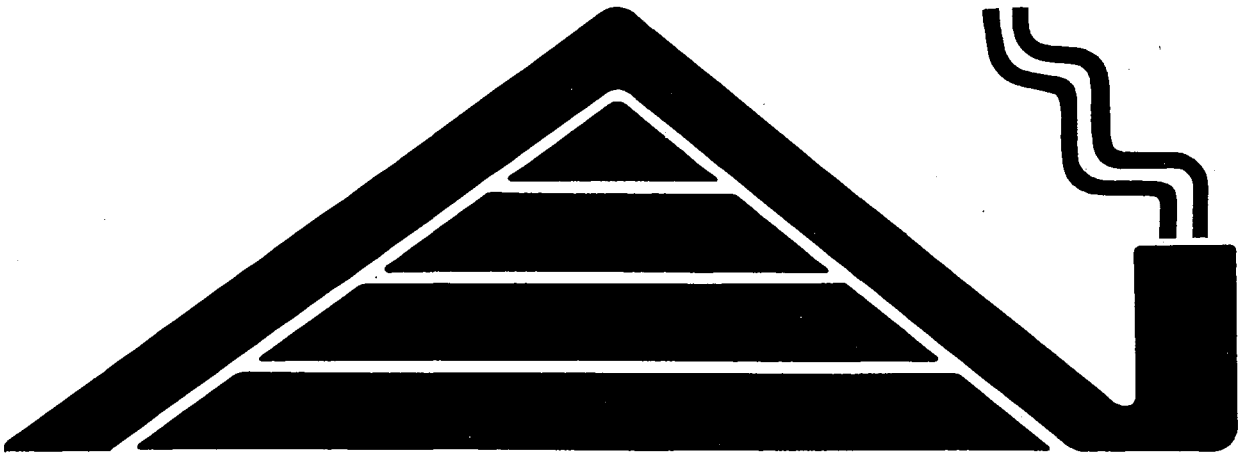

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VOL. 1 NO. 2 FALL, 1982

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Our cover:
June 30 in Dover is the climax of the legislative year. Working under awesome pressure, legislators bring off the improbable: the enactment of laws necessary for the conduct of State business. This issue of DELAWARE LAWYER pays tribute to the General Assembly and examines the relationship between the legal profession and our State government.

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BAR FOUNDATION CORNER

Harold Schmittinger

The American system of justice with its emphasis on individual rights is unquestionably the best system yet devised by man. Nevertheless, criticism of the system has existed since the founding of the Republic. Much of the criticism is rooted in ignorance of the system and thus is unjustified. The failure of the public to properly understand our legal system lies with public education and the public relations (or lack thereof) of the legal profession. This facet of the problem may be a topic for another day.

The subject at hand is the legitimate criticism of our system of justice and what we can do about it. Those of us who practice regularly in the civil and criminal courts are well aware of the causes of congested court dockets, the cost of litigation, and delay. These are the front runners, followed closely by lack of finality and overly technical language incomprehensible to most lay people.

Shortcomings in our system are simply not going to go away. On the contrary, the trend is in the direction of their worsening. For example, rights of criminal defendants established by the Warren Court now seem to have been substantially confirmed by the Burger Court, thus guaranteeing ever increasing procedural hearings and trials. On the civil side, the effect of inflation on hourly rates and incidental litigation expenses has made many civil cases no win propositions for both sides. If you doubt this, compare recent deposition costs with those of ten years ago.

The crisis in our system of justice is, of course, a nationwide problem. Leaders of the Bar and Bench can be frequently heard identifying the problems and reminding us of our obligation to do something about them. Edward Bennett Williams, commenting upon the need to reform our criminal justice system, has suggested that we can no longer afford dark courtrooms. He proposes that criminal courts commence at 8:00 a.m. with a Judge who will sit until 1:00 p.m. followed by a second Judge at 1:30 p.m. who will sit until 6:30 p.m. We must, he contends, "get a handle on this horrible problem".

Chief Justice Burger, in his annual report on the State of the Judiciary given January 24, 1982, entitled "Isn't There a Better Way?", urged the profession to deal with the problem on the civil side by establishing alternative methods of dispute resolution. The Chief Justice defined the responsibility of the legal profession in the following language: "The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about."

At the time the Chief Justice was delivering his report to the ABA, the Delaware General Assembly, coincidentally, had under consideration several bills to provide alternative methods of dispute resolution. This concern was doubtless prompted by constituents' complaints about the present system.

Although no bill passed the General Assembly this year, the subject will probably be on the agenda of the 132nd General Assembly.*

The magnitude of the problem and the need to do something about it were recently recognized in a national conference on "The Lawyer's Changing Role in Resolving Disputes" held at Harvard University under the auspices of the Section of Litigation of the ABA and the

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Harvard Law School. The Bar Foundation sponsored the attendance of representatives of the Delaware Bench and Bar. There are other local stirrings that signal change is in the air. A Delaware Citizen's Conference co-sponsored by the Bar Foundation will be held at the University of Delaware on November 9th and 10th, 1982. It will deal wth the causes of public dissatisfaction with the administration of justice and possible solutions, with heavy stress on alternatives to the criminal justice system as we presently know it. The Bar Foundation has also recommended the establishment of a commission involving all three branches of state government to study the feasibility of alternative methods of dispute resolution in Delaware.

Most of us would agree that in a pragmatic, democratic society such as ours, substantial public dissatisfaction usually brings change. It is respectfully suggested that if fundamental changes in our current system are under way and needed, we should be involved in the process. Historically, the legal profession has always helped shape the institutions by which we are governed. □

*See Speaker Hebner's observations beginning at p. 23 — Editors

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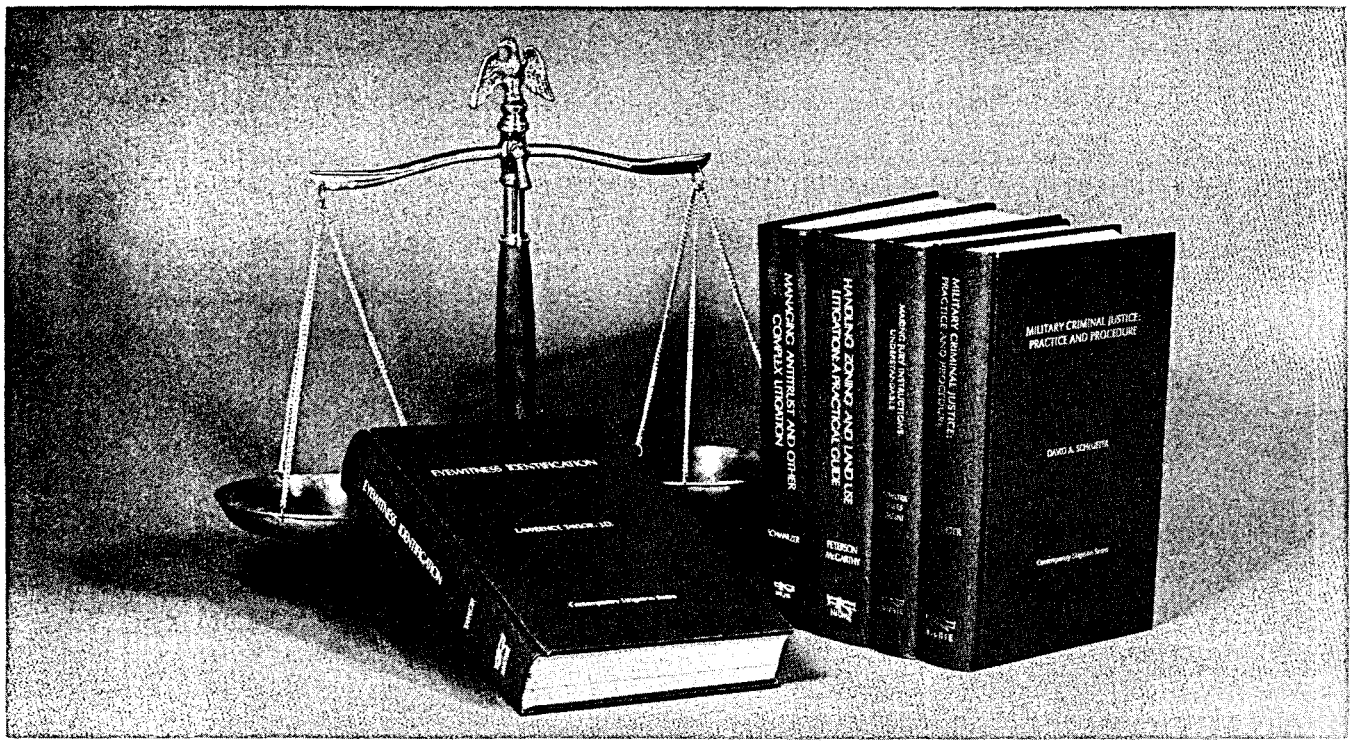

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Editor's Page

William Wiggin, Chairman of the Board of Editors, is rumored to be on unexcused absence from Richards, Layton and Finger, for the purpose of putting out this magazine.

This issue from lead articles to case notes is devoted almost exclusively to exploring the ways in which our profession influences (and is influenced by) the institutions of State government.

The Executive Branch:

How can lawyers assist the smooth administration of an important statute? Indeed, how have they done so? We invite your attention to Glenn C. Kenton's cheering report at page 11 and to the discussion by the Messrs. McBride and Ripsom of the fruitful collaboration among lawyers, legislators and businessmen in achieving new and useful banking laws.

The Courts:

How is the profession dealing with those all too imprecisely framed proprieties of conduct incumbent on him who serves both an electorate and a client in litigation? What is the role of the profession (and of every thoughtful citizen) in improving the administration of justice and in defending the Courts' powers to do those necessary and unpopular things that ensure the survival of our fragile liberties? The Messrs. Furlow, Castle, and Carpenter confront these questions.

The General Assembly:

How can our profession bring its specialized training and experience to the framing of good laws and what can that participation in the legislative process do for us in seeking to become wiser and more useful citizens? Read and reflect on John Babiarz's enlightening experience in pursuit of legal reform.

We repeat: read and reflect. Disagree, if you will, with what is argued in these pages. But above all, discuss, participate, and in so doing, learn.

Nearly two centuries ago Doctor Franklin, leaving the Constitutional Convention, was badgered with inquiries about the sort of governmental scheme being hatched inside the hall.

"We have given you a republic, if you can keep it," was the gist of his reply. We have kept it, and our profession has been prominent in its defense. This issue asks you to reflect upon *your* task in preserving the always imperiled splendor of a free and civilized polity under law.

The Editors

IN OUR NEXT ISSUE:

The third issue of DELAWARE LAWYER should be in your hands by early February. Several articles will deal with the present state of the law of domestic relations in Delaware, all written from different and, we believe, illuminating points of view.

David Drexler has edited some of the reminiscences of the late Mr. Justice Pennewill. The first of a series of these essentially historical pieces will appear in our next issue.

Mrs. Judith Graham, a native of England, is living in Delaware while her lawyer husband is on temporary assignment with ICI Americas. Mrs. Graham, who has extensive editorial experience with an English legal publication, has promised to favor us with an article on judicial legislation for our winter issue.

We expect also to print a piece taking issue with the views expressed by Mr. D'Agostino in his article on school busing that appeared in our inaugural issue.

See you in February!

"The ignorance of one voter in a democracy impairs the security of all."

John F. Kennedy

President Kennedy's statement of 20 years ago is a good reminder of our duty to be informed participants in the upcoming election.

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THE STATE OF THE PROFESSION: THE PROFESSION AND THE STATE

E. Norman Veasey

When Norm Veasey became President of the Delaware State Bar Association this June, we immediately asked him to favor us with a few words for our second issue. (We had created precedent for this by persuading Bruce Stargatt, our previous Bar Association President, to write for our first issue, which Bruce did with happy consequences.) We explained to Norm that this issue would consider the relationship between the legal profession in Delaware and the government it seeks to serve. Since this is a topic of special interest to Norm, he responded enthusiastically.

The first issue of *DELAWARE LAWYER* was well received in the legal community — not only for its quality and style — but also because it announced the pursuit of publishing excellence in Delaware legal topics. Indeed, the name says it all, tersely and well—*DELAWARE LAWYER*. We are proud of our status as Delaware lawyers because our Bar has a reputation around the country for skill and integrity unexcelled by any other bar.

Not only is our practice civilized and of the highest quality, we operate in a geographic, court and political environment that lawyers in other states often envy. Much has been written about the excellence of our jurisprudence and the high quality of our judiciary, but in most analyses of the relationship between our profession and State government, little has been said of the quality of our political environment. Delaware lawyers maintain their national reputation, in part, because of our role in working with the General Assembly to shape good legislation. Session after session, the General Assembly—to its everlasting credit—listens not only to the point of view of the Bar on the passage of good legislation, but it listens to our opinions about what is not good legislation. We do not always agree, but we are heard courteously and thoughtfully. This is particularly remarkable because of Delaware's unique position of having a lawyerless legislature.

When the members of the Bar and General Assembly have worked together, a superior product, nationally recognized as such, has often emerged. Of the examples which come quickly to mind, most prominent is the long history of our outstanding General Corporation Law, an achievement shared by the General Assembly and the Delaware Bar. Since 1899 when the first General Corporation Law was first passed in Delaware, the Bar and the General Assembly have worked together to improve and fine-tune that comprehensive document so that it continues (together with a sound body of judicial precedent) to be the preeminent corporation law in the nation.

More recent examples are readily at hand. In the 131st General Assembly, significant legislation was passed, including a new Limited Partnership Act, the Financial Center Development Act, a modern wrongful death statute, improvements in the Uniform Gift to Minors Act, first and second legs of constitutional amendments and other legislation of importance not only to Delawareans but also to the national legal community.

The General Assembly is to be congratulated on these accomplishments, and Delaware lawyers should be proud to tell our brethren in other states that we have an enlightened relationship with our legislature. We may disagree at times on the merits of particular legislation. While that is as it should be, there have been occasions when some legislators were perceived (erroneously) as being hostile toward lawyers generally (and vice-versa). For the most part, the Bar and the General Assembly enjoy a collegiality and mutual respect not consistent with a myth of reciprocal hostility.

Naturally, some members of the General Assembly are skeptical of some lawyers. This is understandable and healthy. It provides the Bar with the challenge "to earn our wings every day." We accept that challenge and we shall continue to work harmoniously with the 132nd General Assembly and its successors. □

E. Norman Veasey, now President of the Delaware State Bar Association, is a member of the Wilmington law firm of Richards, Layton & Finger, where the emphasis of his practice is on corporate matters, including patent, stockholder and other business litigation. His services on behalf of the profession, the courts and the State in which he lives and practices are imposing. Norm has been Chief Deputy Attorney General of the State of Delaware, Chairman of the General Corporation Law Committee of the Delaware State Bar Association and Chairman of the Delaware Board of Bar Examiners. He is a Trustee of the University of Delaware, Chairman of the Rules Committee of our Supreme Court, and a frequent and expert participant in various programs for continuing legal education. He somehow finds time to write articles, both learned and graceful, for scholarly legal publications. We thank him for his message to our readers—a message that provides both reassurance and reminder of our profession's enlarged duty to the polity of which it is so important a part.

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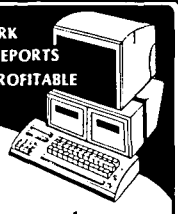

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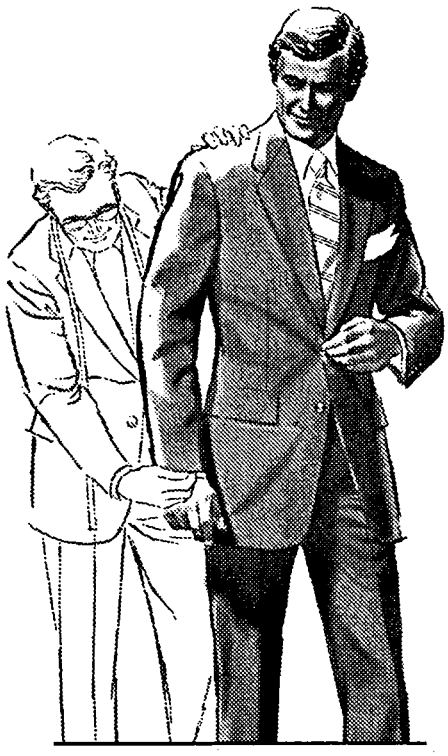

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LETTERS TO THE EDITOR

David Carrad's article in our first issue has prompted an interesting exchange of ideas. We reprint a letter to David from Leonard S. Togman, Esquire, and David's response, addressed nevertheless to the Editors.

David C. Carrad, Esquire
Dear David:

I wish to commend you on your fine article "Family Law Potpourri" in the Delaware Lawyer [Spring 1982].

I do not have any particular expertise in family law but on occasion I am consulted on these matters, particularly tax questions, so I have some familiarity with the subject. Nevertheless, with the caveat that I defer to your superior expertise, I wish to call your attention to possible different answers to two of your questions.

Your answer to Question 10 states that a husband cannot claim a deduction for monthly support awarded by a Court when no one has filed for a divorce. Treasury Regulation Section 1.71-1(b)(3) states that when a couple is separated and they do not file joint returns, then periodic payments made to a wife for support or maintenance under "any type of court order or decree..." are taxable to the wife. Thus, it appears that under this Treasury Regulation, such payments would be deductible by the husband. The *Rafal* decision cited in your answer does not deal precisely with this issue. In *Rafal* the taxpayer claimed he was entitled to head of household rates which he would be entitled to if he was "legally separated" and the District Court held that a decree of separate maintenance did not constitute a legal separation.

Your answer to Question 9C states that the husband may claim an exemption under Code Section 121 for $62,500 if he is separated but not divorced. It appears that if the husband in your example was "legally separated", he would be entitled to a $125,000 exemption because Code Section 121(d)(6) states that for purposes of this section an individual is not considered as married if he is "legally separated from his spouse."

Leonard S. Togman

The Editors, Delaware Lawyer
Dear Sirs:

Since publication of my article (*Family Law Potpourri*) in the inaugural issue, I have heard from several tax lawyers, but, sad to relate, no domestic relations lawyers, about the answers to questions 9C and 10. Answer 9C asserted that a separated, but not divorced, taxpayer could claim only $62,500 on the sale of his or her principal residence under §121 of the Internal Revenue Code. Answer 10 asserted that under *Rafal v. U.S.*, D. Del., 267 F.Supp. 61 (1967) payments of spousal support in a separate maintenance action (as distinct from interim alimony in a divorce action) were not deductible.

Both answers depend on whether the IRS would consider the couple "legally separated". See Internal Revenue Code § 121(d) (6); Regs. §1.71-1(b)(3), *cf.* 13 *Del.C.* § 1503(7). The issue of what constitutes a legal separation under Delaware law in the eyes of the I.R.S. is not at all free from doubt.

Because this area is complex, I will not say that the answers in the article were wrong. I believe there may be sufficient uncertainty for a taxpayer to opt for my answers or the contrary ones as a reporting position. Perhaps some day there will be a definitive ruling on these questions under Delaware law by the IRS or the Federal courts; until then, I think one might argue either side of the issue depending upon whose ox would be gored.

In short, the answers aren't wrong, but the opposite answers might be equally correct. If the preceding sentence strikes you as odd, welcome to the wonderful world of tax law.

David Clayton Carrad

Mr. Togman tells us he has reviewed Mr. Carrad's reply, and is not persuaded.

The Editors

THE GENERAL CORPORATION LAW: How To Live With A Successful Statute

Glenn C. Kenton, Secretary of State

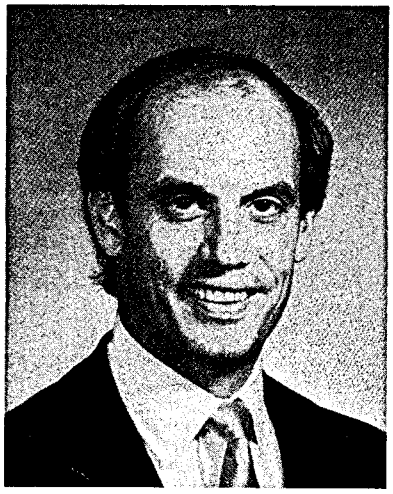
The major revisions of the Delaware Corporation Law in 1967 prompted an explosive influx of new corporations. In 1968 there was what now seems a modest total of 56,000 companies formed and existing under Delaware law. By 1972 there were 73,000 Delaware companies, and this number has *doubled* in the last ten years. While 140,000 Delaware corporations seem insignificant when compared to the total corporations of New York or California, they do constitute 42 percent of the companies listed on the New York Stock Exchange, 35 percent of those on American Stock Exchange, and over 54 percent of the country's largest industrial concerns. The State of Delaware has maintained an annual corporation growth rate of 15 percent for a number of years now. Assuming that rate continues, it is not unreasonable to project that the number of Delaware corporations will again double by early 1988.

In 1968 the 20 million dollars realized in franchise taxes represented 12 percent of the State's income and was the second largest revenue source. At the close of the 1982 fiscal year, the 78 million dollars collected in franchise taxes and fees again represented 12 percent of the net revenue and was second only to personal income taxes as a revenue source.

While the excellent growth rate has enabled the franchise tax to maintain its position as the number two revenue producer, it has also caused problems. Over the years, the Division of Corporations established an enviable reputation for responsiveness in an error-free environment. Eventually, the sheer volume of transactions, in many areas up 400%, began to take its toll. Vault and office space was at a premium, an outdated computer system was hopelessly overloaded, and the telephone intake system regularly and infuriatingly responded with busy signals despite more incoming lines. Accuracy was maintained, but response time lengthened.

In May 1981, with the invaluable help of Bill Prickett as my co-chairman, we assembled a working group composed of members of the Corporation Law Committee of the Bar, executives of the larger service companies, and various State officials. By Executive Order of Governor du Pont that group was constituted the Corporation Task Force. It looked long and hard at the way in which the Division of Corporations conducted its business, and then offered ten recommendations for bringing the response time of the Division back to acceptable standards. Nine recommendations addressed problems that could be dealt with immediately by in-house procedural changes, thereby meeting the requirements of a daily workload. The recommendations were effective: telephone busy signals dropped dramatically and response time improved. The final recommendation confronted the need to modernize and to expand an already outdated computer system faced with the increasing workloads forecast for the next decade.

(Continued)



Elsewhere in these pages (if you insist on being fussy about it, at page 8) Norm Veasey, the President of the Bar Association, salutes the productive collaboration of lawyers and legislators in keeping Delaware's corporation law a model of lucidity, flexibility, and good business sense.

In this article, Secretary Kenton demonstrates vividly the advantages to the people of Delaware of that collaboration. He also furnishes another example of the way in which lawyers and public servants, working together, can make a fine law an efficient one.

Secretary Kenton, a graduate of Swarthmore College, earned his doctorate of law at the Georgetown Law Center. He has been Secretary of State since 1977, and in that role, has been a most effective advocate for Delaware's new distinction as a place hospitable to modern banking practice. (See the McBride and Ripsom articles at pages 32 and 33 of this issue.) We are grateful to Secretary Kenton for the first-hand insights into the day-to-day workings of an important statute.

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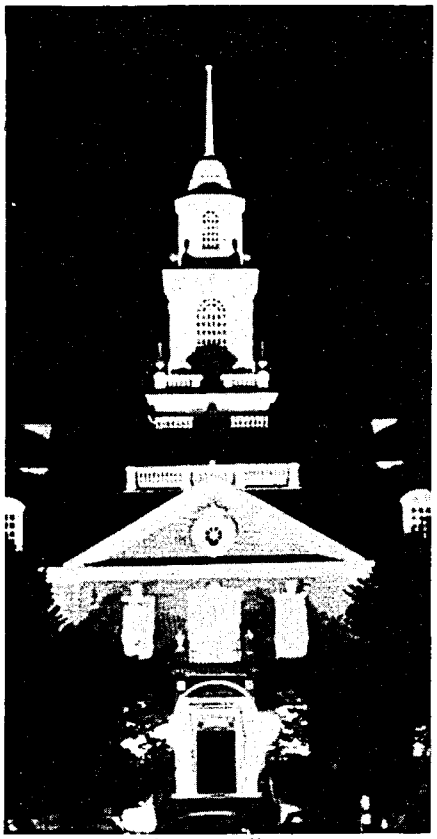

Legislative Hall, Dover
June 30, 1982

LAWYERS AND LEGISLATORS

Michael N. Castle
Lt. Governor

The Honorable Michael N. Castle has been Lieutenant Governor of Delaware since 1981. During his term he has brought a refreshing activism to an office once regarded as largely ceremonial. He heads the Governor's Small Business Council; he has led a Delaware trade mission to Europe; he has made a searching study of a vast number of State boards and commissions, and has proposed changes for their more effective functioning.

Although Mike is only 42, he has long service in State government. He has been a Deputy Attorney General, a member of the House of Representatives, and a two-term senator.

Delaware's General Assembly, sixty-two strong, is composed of farmers, businessmen, housewives, retirees, but *not one single attorney.* No lawyer has been a member of the House or the Senate since 1976. Historically, the legal profession has been dominant in its representation in state legislatures. People often ask why lawyers don't serve in the Delaware General Assembly. People wonder why many lawyers fail to seek elective office, and they ask if members of the legislature have any dealings with the legal profession. This article will address these questions. Although a precise answer to any of them is impossible, and the subject is rife with differing interpretations, I feel I can draw some general principles from my experience as a lawyer legislator.

The first question (why don't more lawyers become members of the General Assembly or seek elected office?) raises still more questions about the relationship between lawyers and legislators. Many reasons have been cited for the lack of lawyers — extensive time commitment, low salaries, law practices limited by conflicts of interest, the attitude of the General Assembly toward lawyers, and lawyers' preening self-regard: "We are above politics at the State House level." Each of these notions contains that infuriating mixture of truth and myth that Norman Veasey confronts elsewhere in these pages.

First of all, we should understand a legislator's commitment of his time and what he receives for it. Time commitment is divided between running for office and serving, if elected. The time spent running for office is further divided between securing nomination and winning an election. The time required to gain office can vary tremendously from district to district. I think it's safe to say that legislative candidates have spent anywhere from ten hours to six months of full time work in waging a campaign. Generally, a respectable campaign can be staged with preparatory activity in June and July, followed by a substantial commitment in August, September and October. Rarely is this a full time commitment, and the candidate can continue to practice law while he runs for office.

Time commitments to service in the General Assembly will vary greatly, subject to the changing season of the legislative year, the extent to which one assumes committee assignments and leadership roles, and the devotion that the officeholder gives the job. The first six months of each year involve legislative sessions for all but eight weeks, six in February and March for Joint Finance Committee meet-

ings and two at Easter. Sessions convene most days at 1:30 p.m. and run ordinarily to 6:00 p.m. They run much later in June. Attendance is practically 100%. Sessions the other six months of the year are rare. Committee assignments and leadership roles add to the time spent on the floor of the legislative chamber. For example, Joint Finance Committee members meet for six weeks almost every work day, and almost all day. Legislative leadership meetings usually involve one meeting a week with the Governor and regular caucus meetings. Additional meetings occur in June when the usually sedate legislative process turns frenzied. A devoted officeholder can easily subject himself to a substantially increased time commitment to constituent problems, correspondence, conferences, and many other functions. Clearly, any practicing lawyer must be careful in budgeting his time effectively. No rule can be absolute when it comes to the lawyer/legislator, but my experience tells me that the legislative role demands about 40% of one's annual working hours, principally during the first months of the year.

A legislator receives a salary of $11,400 a year and $2,500 for expenses. While a salary of this magnitude is not the royal road to early retirement, it is in addition to whatever the attorney can earn practicing law. I think this is far less restrictive than requiring legislators to serve full time at, for example, $30,000 a year. Some lawyers have told me that their *total* earnings did not change much when they entered the General Assembly. Others say that their income decreased somewhat. Virtually all report that their earnings *improved after* leaving the General Assembly.

There can probably be no last word on conflicts of interest for lawyers in the General Assembly, but until recently the general sentiment has been that attorneys in the legislature and their firms should not represent or sue the State or a State agency. The Bar Association's latest pronouncement (opinion 1982-5) has liberalized the prevailing view. This should decrease, if not eliminate, one deterent to attorney candidacy for public office. (See case note at page 26.)

If a lawyer does not seek to pursue public office but would like to become involved in the legislative process, he can become a House or Senate attorney. There are usually three attorneys in each body, two allocated to the majority, one to the minority. Pay is per diem and an attorney works about sixty legislative days a year during the same hours as legislators.

Lawyers are probably most often seen in the General Assembly these days as lobbyists, some paid and some on their own time supporting causes in which they believe. Some lawyers hold themselves out as lobbyists for paying clients, who retain them for a specific lobbying role. It is more common, however, for an attorney to represent an on-going

Top to bottom, left to right: House Speaker Charles L. Hebner; Representatives Joseph R. Petrilli, Thomas E. Brady, Harry Derrickson, and Richard Sincock.

client on a project requiring legislation. The best representation is often rendered by the attorney who believes in a cause and appears *pro bono*. Perhaps members of the General Assembly like to see lawyers work for free. It is more likely that they truly admire public spirited conduct. In any event, *pro bono* lawyers are generally well received in Dover.

While individual lawyers seem to function well as lobbyists, the State Bar Association seems less effective. I estimate that more than half of all legislation introduced in the General Assembly is considered without any guidance or comment from the legal community. Top priority legislation can be quite another story. (For example, see John Babiarz's account of the legislative process by which our new wrongful death statute became law, at page 18. See also Norman Veasey's observations about the creative role of lawyers in the framing of significant laws, at page 8.) Too often, however, there is no professional input where it is plainly needed. For example, a bill that would have eliminated adverse possession was halfway through the General Assembly this year, before a few members of the Bar realized how destructive this might be to real property law and mounted successful, if tardy, opposition. I have seen representatives of the Bar Association arrive in Dover to oppose legislation after the sponsor has secured passage. Time and again the Assembly enacts awkward legislation that a lawyer with even a rudimentary knowledge of the pertinent law could have straightened out. Legislation blatantly in error or totally against acceptable Delaware legal principles will pass one or both Houses and occasionally become the law of the State. For example, the legislature this year passed a Bill to publicize fines for littering. After the Bill reached the Governor's office, a closer examination showed that it would have had the effect of lowering littering fines, a result which none of the sponsors nor the legislature that passed it had certainly intended. Needless to say the Bill was vetoed, thereby washing out a considerable amount of hard work by the General Assembly.

It is my recommendation that the Bar Association, which undoubtedly has a greater interest in the laws of this State than any other group in Delaware, organize itself to construct safeguards against the abuses of the past and to affirmatively help the legislative process and the General Assembly. With the Bar Association now organized into sections, it should be relatively simple to have a group in each section which would offer its services to the various legislators for the drafting and review of legislation in its area of expertise. These groups should be equipped to react immediately to legislative proposals, to suggest modifications, and, if this effort fails, to conduct well organized, informed opposition. The Bar Association has now employed a lobbyist who should prove an immense help in calling key legislation to the attention of the proper people in the Bar and in flagging problems. This does not lessen my feeling, however, that the Bar Association should be more involved in the legislative process.

One final touchy subject must be confronted: the attitude of legislators to lawyers, either as members in their midst or outsiders dealing with the House or Senate. Ten years ago there were legislators who deeply resented attorneys and were belligerent to any one with a legal background. In fact, I was challenged to a fist fight in my first caucus after being elected to the Delaware State Senate, and I gave some serious thought to accepting the challenge before cooler heads prevailed. That thinking has changed substantially today, and while attorneys are still treated by some legislators, if not with distrust, at least with unflattering caution, a number of legislators welcome legal guidance and listen carefully to an attorney's position before deciding how to vote. Certainly, if the Bar Association were to play a more active role in formulating better legislation, stronger rapport would develop.

Lawyers often say that they want no part of the rough and tumble of legislative politics. This prissy and fastidious attitude is self-defeating. It deprives the legislative process of our profession's valuable disciplines. It deprives us of a broadening, and even inspiring, knowledge of the ways in which a democratic government gets its business done. "Legislative politics" is the by no means dishonorable business of achieving decent accommodation of divergent views. At its best it is an exercise in the civilized practice of rendering courtesy to those with whom we respectfully disagree. For a heartening example of this, I invite your attention once again to John Babiarz's article in this issue.

In addition to depriving the Delaware State legislature of valuable legal assistance by refusing to get involved, lawyers may be overlooking a tool in their practice—helping clients by working with the legislature. A small group of lawyers has developed this type of work and they have found it to be lucrative as well as professionally rewarding.

Actually legislative give and take is welcome after the sameness of law practice, and you soon learn to approach your allies and adversaries as a legislator, not a lawyer, but armed with a lawyer's valuable training. I don't think any lawyer elected to the General Assembly has regretted it. It has given *me* great professional satisfaction and warm respect for those with whom I have served. □

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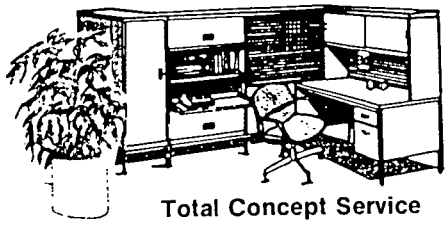

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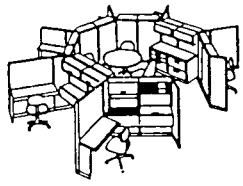

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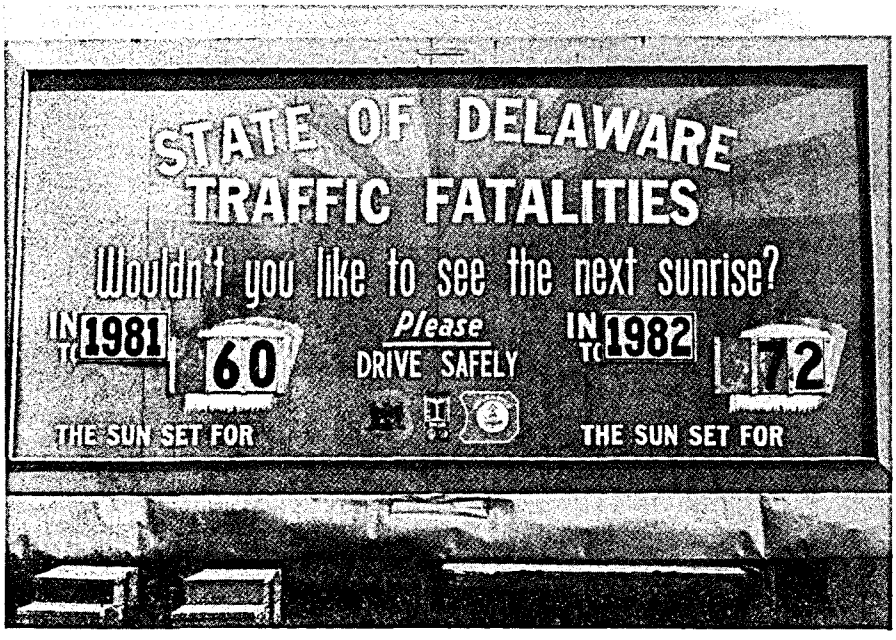
A NEW WRONGFUL DEATH ACT FOR DELAWARE

John E. Babiarz, Jr.



"It appeared that the plaintiff was much attached to his deceased wife... But Lord Ellenborough said...'in a Civil Court the death of a human being could not be complained of as an injury.'"
(*Baker v. Bolton*, 170 Eng. Rep. 1033, 1 Camp. 493, Ellenborough, Lord Chief Justice, Court of King's Bench, 1808.)
"The trial judge permitted the jury to consider as an element of damage the pecuniary loss to the husband of the value of the household services rendered him by the decedent. In so doing the trial judge committed reversible error."
(*Abele v. Massi*, 273 A.2d 260, Wolcott Chief Justice, Supreme Court of Delaware, 1970.)

Baker v. Bolton is identified by most legal scholars as the case which established the common law rule that the survivors of a person killed by a wrongful act cannot recover damages from the person who committed the act. Lord Ellenborough gave neither reason nor precedent for his ruling. The same scholars who identify *Baker v. Bolton* as the seminal case can find no precedent or good reason for the ruling and they take pains to point out that Ellenborough was considered even by his contemporaries to be a judge uncommonly lacking in common sense. Lord Campbell, Ellenborough's reporter, wrote in his autobiography that he simply did not report some of Ellenborough's more egregiously stupid rulings.

Chief Justice Wolcott, on the other hand, could never be accused of lacking common sense or scholarship. Yet he seemingly had little difficulty in concluding that a widower could not recover for the cost of replacing household services performed by a wife killed in a car accident. One hundred sixty two years of precedent can be an immovable object for any judge. Legislatures, however, are less respectful of ancient doctrine; and, recently, the Delaware General Assembly, following the lead of many other states, enacted a statute which will largely do away with the remnants of Ellenborough's harsh ruling.

First, a little more history. The rule of *Baker v. Bolton* was too much even for Victorian England. In 1846, Parliament passed the Fatal Accidents Act (more commonly known as Lord Campbell's Act) which allowed surviving family members to recover damages "for the death." English Judges, however, soon interpreted the Act to allow recovery for pecuniary losses only. This meant that the deceased's surviving spouse and children could claim as damages only such sums of money as the deceased would have contributed to them for their support had he lived and the amount by which the deceased's estate had been diminished by virtue of his early death. No compensation could be awarded for any of the emotional pain or other inchoate injuries caused by the death. This became known as the "pecuniary benefits rule."

In Delaware, the rule of *Baker v. Bolton* was considered firmly in place during the early 19th century, since our jurisprudence was rooted in the English common law. It was not until 1866 that Delaware enacted its version of the Fatal Accidents Act, known here as the Wrongful Death Act. The spur for enactment was an increasing number of railroad accidents, as encounters between citizens and the iron horse tended not to leave walking wounded.

This statute, 10 *Del C.* §3704 (b), with one technical amendment in 1901, has been in full force and effect for the past 116 years. It provides simply that the surviving spouse or personal representative of the deceased (his executor or administrator) may claim damages "for the death and the loss thus occasioned."

In the first reported case under the statute, *Flanagan's Adm. v. City of Wilmington*, Del. Super., 4 Houst. 548, (1873), a lawsuit involving the death of an eleven year old boy, it was argued vigorously that the legislature did not intend to limit damages to pecuniary losses only. But the case was dismissed on another point without any expression of opinion by the Court on the issue. Thereafter, in a series of decisions in the late 19th and early 20th centuries, Delaware courts adopted *in toto* the English pecuniary benefits rule. These decisions are remarkable in that they are devoid of any reasoning, discussion of legislative intent or citations to precedent. It is as if Ellenborough had firmly established a style, if not a substance, for rulings in wrongful death cases.

More remarkable is the fact that our modern courts have followed these prior decisions almost abjectly, even though strict adherence to them has produced some bizarre results. For example, where the victim is a young child the only available measure of damages under the pecuniary benefits rule is the lost value of the child's potential estate, since a child would have no actual dependents. In 1905 in a case involving the death of a 15 month old girl, a New Castle County jury was instructed by the trial judge: "[You may award] such sum of money as would represent whatever the child would have accumulated at the end of her life and left as her estate... *You will have to get at it the best way you can.*" (*Skonieczny v. Churchman* Del. Super., 78 A. 634, 1905. Emphasis supplied.)

"The new law limits recovery of funeral expenses to $2,000. Limitation was deemed advisable lest a merry widow decide to scatter her beloved husband's ashes in person on the French Riviera."

Nearly half a century later, Chief Justice Herrmann, then a Superior Court judge, described this application of the pecuniary benefits rule as a "sea of pure conjecture", "an unreasonable and impracticable mass of imponderables." (*Cann v. Mann Construction Co.*, Del Super., 93 A.2d 741, 1952). Yet the rule is still applied today, perhaps only because there is no other measure of damages for the death of a young child under current law.

Several modern decisions have held that funeral expenses cannot be reimbursed in a wrongful death lawsuit. This staggers most laymen. These decisions are all ultimately based on an 1899 opinion of Chief Justice Lore in *Wilcox v. Wilmington City Railway Co.*, Del. Super., 44 A. 686. In that case, the plaintiff's attorney asked a witness about funeral expenses and the defense attorney objected. The Chief Justice's decision is reported as follows: "The Court held the matter under advisement overnight and...the next morning sustained the objection." One wonders whether the Chief Justice lost any sleep that night. And if he didn't whether he should have.

This curiously strict adherence to legless precedent is even more curious since our Supreme Court has held that "the supplying of reasons for a judicial decision is part of the established law of this State." (*Cannon v. Miller*, Del. Supr., 412 A.2d 946, 1980). In that case it remanded a "one liner conclusionary decision" to a lower court for an explanation. Almost invariably, though, the decisions upon which today's version of the pecuniary benefits rule rests are one liner conclusionary decisions with no explanations. Such is the force of the rule of *stare decisis*.

This sorry past will become history on December 1, 1982, when, just in time for holiday mayhem, a new statute governing actions for wrongful death takes effect. (10 *Del C.* Ann. §§3721-3725). In place of the vague language of the old statute, circumscribed by judicial interpretations even the judges don't appear to be happy with, the new statute

John Babiarz's interest in recent legislative changes in Delaware's wrongful death law arises naturally. During his sixteen years of practice, he has devoted a great deal of time to personal injury litigation. John, a Harvard Law School graduate and a member of the Wilmington firm of Morris, Nichols, Arsht & Tunnell, has been actively associated with the Delaware Trial Lawyers' Association. He presently serves as a trustee of its Political Action Committee. John's involvement in drafting the new statute gives him a particularly vivid insight into the legislative process described in the second half of his article.

recognizes five elements of recovery. In addition, it contains a statement of purpose for the guidance of the courts in its interpretation.

The stated purpose is "to permit the recovery of damages not limited to pecuniary losses by persons injured as the result of the death of another person" (§3725).

The specific elements of damage are stated in section 3724(d). Subsections (1) and (2) permit the court or jury to render an award for "(1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries that would have resulted from the continued life of the deceased," and "(2) loss of contributions for support." This essentially duplicates the old "pecuniary benefits" rule. Retention of the rule is important since in many cases pecuniary loss is the most important loss sustained, as where the deceased is the family breadwinner. The real importance of the new law, however, is found in the addition of three new elements of recovery.

Subsection (3) allows awards for "the loss of parental, marital and household services, including the reasonable cost of providing for the care of minor children." This abrogates the rule of *Abele v. Massi*. But it goes further. *Abele v. Massi* dealt only with the pecuniary value of household services. This subsection allows recovery for the loss of parental and marital services as well and does not limit the measure of those losses to pecuniary items.

Subsection (4) allows an award for: "reasonable funeral expenses not to exceed $2,000." This corrects the odd anomaly of the old exclusive pecuniary benefits rule which prohibited such recovery. A limitation in amount was deemed advisable lest a merry widow decide to scatter her beloved husband's ashes in person on the French Riviera. The amount of the limitation duplicates that in the No-Fault Statute.

Finally, subsection (5) allows recovery for "mental anguish resulting from [the] death." This claim, however, is allowed only to the deceased's surviving spouse and children, if any. If there are none, as will be the case when a minor child is the victim, then the parents of the deceased may make the claim. The allowance of this element of damage may dry up the "sea of pure conjecture" referred to by Chief Justice Herrmann in *Cann v. Mann Construction Co.* With the availability of mental anguish as a measure of damage for the death of a child, courts may come to regard evidence of lost estate values as too speculative under the standard doctrine that damages must be proven with some specificity. At the same time, the court or jury will be able to address the real injury caused by the death of a child: the emotional pain of the loss.

The addition of this element of damage and that stated in subsection (3) will add a necessary element of reality to the adjudication of wrongful death cases. Under the old statute, the focus was entirely on financial matters. While important in many cases, pecuniary losses seldom told the whole story of the injury caused by a death, thus rendering final awards, even large ones, somehow deficient. One has only to advise a widow that the law will measure the value of her husband's life only in terms of his salary to understand that no adjudicative process so limited could be considered fully satisfactory to the persons involved. For parents aggrieved at the loss of a child, current law is simply an exercise in fiction. On the other hand, present law may have allowed large awards for pecuniary losses to survivors estranged from, maybe even hostile to, the deceased, because the law permitted no examination of the human relationship interrupted by the death.

Under the new statute the quality of the relationship terminated by the death will be legitimately in court. The parties, plaintiff and defendant, will have the opportunity to explore the reality of the loss occasioned by the death and to receive an adjudication founded on that reality. The new statute challenges our courts to fashion fair, just and workable rules to replace the "unreasonable and impracticable mass of imponderables" which currently govern wrongful death actions.

"An unfortunate impression exists that the legislative process is totally enmeshed in partisan politics and political wheeling and dealing. Certainly this goes on. It is part of the process in any democracy. But many, many bills are considered solely on their own merits, and the discussions of this one centered on what it did, whether it was necessary, and whether it was right."

The new Wrongful Death Act, House Bill No. 426, was passed in the State House of Representatives by a margin of 31 to 2 and in the State Senate by a margin of 19 to 1. This overwhelming approval reflects a strong legislative endorsement of the public policy expressed in the Act but it also tends to mask the real effort that was necessary to obtain passage. The problem addressed by the Act was well known to any lawyer practicing in the personal injury field, but it was hardly a matter of burning public importance. The problem for the proponents of the legislation was to stimulate the legislature's interest in straightening out a small but important area of the law that had become badly out of phase with present day notions of justice.

The bill was introduced at the initiative of Delaware Trial Lawyers Association ("DTLA"), an organization of attorneys generally interested in the administration of justice and specificially interested in the rights of injured persons. This organization actively lobbied for the bill. It was sponsored by Representative Roger P. Roy (R-Arundel) who became its active and very effective floor manager. Representative Roy's interest in the bill was indispensable to passage. Not only did he perform the obvious and important function of being an advocate for the bill as a member of the House of Representatives itself, but he also served to keep the DTLA posted on committee hearings, agendas, and key points of opposition. The lesson is that an able legislative godfather is key to the passage of any bill, especially one regarded as less than a pressing public issue.

Advocacy for the bill proceeded on two levels, direct approaches to individual legislators, and formal appearances at committee hearings, public hearings and on the floor of the legislative chambers. Each was important.

The individual meetings and early committee hearings disclosed problems with the original draft of the bill and allowed the formulation of amendments. Absent this process, a real risk would have been run that opposition sufficient to defeat the bill might have coalesced around a diversity of small points insignificant to the real purpose of the bill.

First, some legislators expressed concern that the statute as originally drafted described non-pecuniary injuries too vaguely. This language, virtually copied from the Maryland Wrongful Death Act, did appear somewhat imprecise. Consequently, an amendment was drafted which sharpened the bill considerably and satisfied legislative misgivings.

Second, substantial opposition developed to the allowance of punitive damages in the original bill. This was amended out since it was not critical to the purpose of the bill which was to correct the measure of compensatory damages allowed for wrongful death.

Third, concern was expressed that the courts might apply the bill retroactively and that insurance carriers might need some time to adjust their underwriting practices to it. This was met with an amendment postponing the effective date of the legislation to December 1, 1982.

Finally, concern developed that the class of persons entitled to claim damages for mental anguish was too broad. As originally drafted, that class would have included the parents and siblings of the decedent in addition to the surviving spouse and children. The situation of a deceased survived by a spouse, several children, both parents and several brothers and sisters created the possibility of a whole busload of claimants and this bothered many legislators. The solution, which did no real violence to principle, was to limit the class to the surviving spouse and children, if any, and if none, to the victim's parents.

These problems and concerns, of course, did not arise out the mist. They were the product of an active effort on the part of the American Insurance Association, an organization of casualty insurers. While the AIA professed not to object to the fundamental object of the bill, one suspects that it would have been happy to see it defeated. Raising these small problems may have been part of a strategy seeking that end, and intransigence by proponents of the new law might well have been fatal. No one should go to the General Assembly without expecting to compromise on something.

But on some matters compromise is not possible. The AIA procured the introduction of an amendment which would have stripped mental anguish from the legislation as an element of recovery. As this attacked the essence of the bill, it was necessary to go to the mat. A spirited and sophisticated debate on the amendment took place on the floor of the House of Representatives, which was conducted largely in the form of questions addressed to a DTLA member who had been granted the privilege of the floor. The amendment was defeated and passage of the bill quickly followed.

In the Senate, no "nuts and bolts" problems arose, probably because of the intense scrutiny to which the bill had been subjected in the House. However, still another attempt was made to amend out the mental anguish element of damage. Again a stimulating debate on the floor put tough questions to DTLA and AIA representatives. The amendment was defeated and the bill passed.

The key to capturing the sympathetic attention of the legislature was Chief Justice Wolcott's decision in *Abele v. Massi*, a Supreme Court ruling that the household services performed by a wife and mother had no compensable value. There never was any argument, even from the AIA, that this decision needed correcting. But its existence allowed the introduction of a bill of broader application, and in the end most of the legislators' attention was focused on that broader intent. Absent the cultivated insensitivity of *Abele v. Massi* it is questionable whether serious interest in the bill could have been developed. The abstract proposition that non-pecuniary damages should be awarded in wrongful death suits lacks the concrete appeal of overturning a court decision branding a woman's life valueless because she had devoted it to being a wife and mother.

The DTLA's lobbying effort was orchestrated by Harold C. Schmittinger, Esquire*, its registered lobbyist. It consisted of considerable direct approaches to legislators and the provision of written material in support of the bill. This gained support for the bill and armed supporters for debate. The quality of preparation for debate was impressive. Ada L. Soles (D-Newark) in the House and Myrna L. Bair (R-Northshire) in the Senate mastered sophisticated and detailed statistics covering highway fatalities, insurance, and results of wrongful death litigation. This enabled them to ask some very telling questions on the floors of their respective chambers.

In addition, this process identified opponents and informed the DTLA of the basis for opposition. This was very useful in preparing for the floor debates, which were characterized by a real understanding of the issues. The three members of the General Assembly who voted against the bill were willing to discuss their positions ahead of time and not impede debate on them. In fact, the only senator who voted against the bill, Robert J. Berndt (R-Gordon Heights), actually requested the privilege of the floor for the DTLA representative.

An unfortunate impression exists that the legislative process is totally enmeshed in partisan politics and political wheeling and dealing. Certainly this goes on. It is part of the process in any democracy. But many, many bills are considered solely on their own merits and this was one of them. Whether on the floor of the legislature or in private conversation, discussions centered on what the bill did, whether it was necessary, and whether it was right.

Advocacy in the General Assembly is in many ways very different from that in the courtroom or at the bargaining table. *For one thing it's the lawyer who gets cross-examined.* The basic tasks are, however, the same: full knowledge, full preparation and hard, hard work. In the legislature, as elsewhere, it can't be done with mirrors. And you get to hear the jury vote, one by one by one.

One final note regarding lobbying in a year when the entire legislature is up for election: the hors d'oeuvres at the Gold Key Club are delicious.□

*See Bar Foundation Corner at page 3.

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C. L. Hebner

FOREWORD

I have been asked to write an article on dispute resolution outside the courtroom, a subject near to my heart. In doing so I will be weaving through some personal thoughts and observations that may help you understand my measured conviction that procedures for out of courtroom dispute resolution must become an integral part of the Delaware justice system.

It is inevitable. Whenever I meet elected officials from other states they always ask — "Is it true that you don't have any lawyers in your legislature?" After confirming the fact, I get two conflicting reactions — "That's great! How did you arrange that??" and — "How can you get along without them?"

My personal feelings about lawyers are likewise ambivalent.

Lawyers' feelings about me are ambivalent, too.

I was the sole sponsor of a bill that allowed out-of-state doctors to testify in Delaware malpractice suits. When it finally passed, various legal groups gave me accolades, pats on the back, and one campaign contribution which failed to offset my loss of contributions from medical and insurance groups that had vigorously opposed the bill.

During the next session I put in an anti-barratry bill which would have penalized lawyers for initiating frivolous suits. The accolades stopped, as did the legal society's campaign contribution.

Incidentally, if re-elected I am considering introducing anti-barratry legislation in the next general assembly. Currently I am evaluating legislation from Illinois, Maryland, and Connecticut that seems to address the problem as I see it.

Illinois has in force a statute which says: "Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at trial." *Illinois Revised Statutes, Chapter 110, § 41.*

Section 41 is an attempt to penalize the litigant who pleads frivolous or false matters or brings a suit without any basis in law and thereby puts the burden upon his opponent to expend money for an attorney to make a defense against an untenable suit.

Rule 604 (b) of the Maryland Rules of Procedure also has caught my attention. It provides that: "In an action or part of an action, if the court finds that any proceeding was had (1) in bad faith, (2) without substantial justification, or (3) for purposes of delay; the court shall require the moving party to pay to the adverse party the amount of the costs thereof and the reasonable expenses incurred by the adverse party in opposing such proceedings, including reasonable attorneys' fees."

The Illinois statute includes "allegations and denials" and the Maryland rule makes reference to "any proceeding," since a law permitting the assessment of attorneys' fees against a plaintiff only might be subject to constitutional attack as a violation of equal protection under the 14th Amendment. The Connecticut statute covers this potential problem: "In any case in which an affidavit has been filed by the defendant, or a statement that he has a bona fide defense has been made to the court by his attorney, and the plaintiff recovers judgment, if the court is of the opinion that such affidavit was filed or statement made without just cause or for the purpose of delay, it may allow to the plaintiff, at its discretion, double costs, together with a reasonable counsel fee to be taxed by the court." *Connecticut General Statutes Annotated, Title 52, §245*

Please understand that any legislation I introduce is aimed at a problem, not the legal profession as such. I truly believe that in the long run the practice of law cannot be enhanced by taking frivolous or nuisance issues to court.

Lawyers even have ambivalent feelings about other lawyers, as well as judges — and vice versa.

The Washington Legal Foundation, a public interest law firm, takes

(Continued)

Charles L. Hebner is now serving his fourth term as a Delaware State Representative (9th District) and his first term as Speaker of the House. Mr. Hebner is a native of Baltimore County, Maryland, and a graduate of the University of Maryland. He is Assistant for Community Affairs, ICI Americas, Inc., of Wilmington. He has extensive experience in marketing and public relations, and in free lance-writing. He has served as a reporter for Baltimore and Washington papers, and is now a member of the Overseas Press Club of America. In the sphere of government Mr. Hebner is active in the National Conference of State Legislatures and the Governing Board of the Council of State Governments, to which he was appointed in April, 1980. His exceptionally wide range of interests embrace church work, charitable organizations, and such diverse disciplines as flying, football, and Mayan archaeology. The Editors believe that an article by a man with such wide ranging interests promises to entertain and provoke thought.

violent exceptions to many actions of the lawyers who make up the American Civil Liberties Union for their support of unpopular causes and defendents. The Foundation, in fact, refers to the ACLU as the American Criminal Lovers Union. The ACLU, in turn, makes no bones about its feelings towards the Foundation.

In addition, the Foundation has launched Operation Court Watch. In the words of Foundation head Daniel Popeo, Court Watch takes issue with judges whose decisions are seen as being too lenient and asks them to explain their reasoning. One judge, for instance, was called to task for sentencing the admitted killer of an eighteen-year-old girl to an 18-to-54 month jail sentence. A Missouri judge got a Court Watch letter when he sentenced a university professor to 60 days in jail for the hammer slaying of his wife.

In addition to its own activities, Court Watch is attempting to set up various citizen groups to monitor local court actions. These have already begun in several states.

In 1978, a group of unsuccessful Delaware Bar applicants, many of whom are licensed attorneys in other states, organized a committee to reform the policies and admissions practices of the Delaware Bar Association. Their complaint was a simple one. They claimed that the Delaware Board of Bar Examiners' policies and practices, especially their grading policies, were artificially created barriers calculated to fail large numbers of candidates.

As for judges' feelings, we can turn to our own former Justice James Tunnell, who recently told the Wilmington Rotary Club that the reason there are so many lawsuits nowadays, has much to do with the excessive numbers of lawyers. In making his point he quoted a 200-year-old statement that says, "Lawyers are plants that will grow in any soil that is cultivated by others, and, when once they have taken root they will extinguish any vegetable that grows around them . . . . The most ignorant, the most bungling member of that profession will, if placed in the most obscure part of the country, promote litigiousness and amass more wealth than the most opulent farmer, with all his toil . . . ." "Someone is always available who will be glad to bring an action," he added.

To underline his last statement, Judge Tunnell refers to a recent case about a disputed football referee's call as to whether or not a Washington Redskin receiver had held the ball long enough in the end zone to score the winning touchdown, and the wheelchair-bound man who sued the New York City Road Runners for not allowing him to participate in the New York City Marathon.

Judge Tunnell is about right. There are now almost 550,000 lawyers in the United States and a backlog of 168,000 cases in federal courts. Who knows what the state court backlog numbers are?

"At some point it almost doesn't matter who wins or loses. The important thing is that people have had their say before someone they feel is fair and impartial and, who has been made to listen to the other guy's argument as well. You may not agree with the referee's decision, but if you really believe he made it in good faith, most of the sting is gone."

I have a great deal of respect for most of the lawyers I know. In truth, I rely heavily on Chief House Counsel, Mr. Bruce Hudson, for advice and guidance on thorny issues facing the House of Representatives. My deal with Bruce is a simple one. I explain the situation and pretty well let him take it from there. He usually knows the decision I should like to hear him give, but it is understood that under no condition is he expected to come out with an opinion that would compromise his personal or professional integrity. However, in a "tie-goes-to-the-runner situation," I expect him to consider me the runner. When all of my other objections fail, the least he can do is raise the constitutionality question, of course.

My work in Washington often brings me in contact with congressional staff and regulatory agency lawyers, most of whom are fair and helpful. Too many, however, tend to think in adversarial terms, particularly in dealing with private enterprise. Too often they seem to assume that anything the corporate world wants is intrinsically evil and must be thwarted at any cost. This also holds true for many single-issue advocacy law groups such as the one that testified on the last day of hearings for the federal superfund bill. This particular group referred to information from a Library of Congress study that visibly affected members of the committee and may have led to overkill wording in the original bill. Later, people discovered no such Library of Congress study had ever been made.

At the state level, I have the greatest respect for the Delaware Bar Association. I am grateful for the offers of assistance it has made to help with the researching, writing, and interpretation of legislation. While there might be a certain element of self-serving here, I truly believe that the offer was made to help achieve better legislation.

But back to the basic problem. The proliferation of lawyers seems to create more litigation and more legalistics that in turn create the need for more lawyers to go to courts already seriously backlogged. People more cynical than I feel that corporations, insurance companies, and even individuals sometimes refuse to pay just debts—particularly small ones—secure in the knowledge that the cost of court action far exceeds the amount involved and, therefore, no action will be taken. No wonder people yearn for simpler, quicker, cheaper resolutions of their "legal" problems.

"People's Court", the leading TV show, expresses this yearning. Who would have thought that such a show could become a prime time favorite? It did because it touches on a basic human need—to be heard. It purports to show real people with real problems standing before a judge and having their say unfettered by mysterious court protocol and time-consuming lawyers' esoterica.

Like most state representatives, I, too, have played mediator and umpire for constituents' problems. At some point it almost doesn't matter who wins or loses. The important thing is that people have had their say before someone they feel is fair and impartial and who has been made to listen to the other guy's argument as well. Many times they solve their own problems. In some

cases it is like playing in a ballgame. You may not agree with the referee's decision, but if you really believe he made it in good faith, most of the sting is gone. You may have lost, but you had your shot.

Excessive and frivolous suits — rising legal expenses — more and more lawyers — a legal profession that is in a yeasty, fermenting period of change — court overloads — all of these add up to a need for alternate methods of settling disputes.

The mediation-arbitration (med-arb) approach has broad-based support. The National Dispute Resolutions Act of 1979 was backed by the American Bar Association, the United States Chamber of Commerce and Better Business Bureau, the National Conference of State Chief Justices, and the United States Departments of Justice and Commerce. Some of the support was for the bill itself and some for its principles, but nonetheless it was there.

Despite such widespread agreement on our general direction, the precise route we should follow is not clearly defined. Already in Delaware we have several courts that are expanding their mediation capabilities. To date, however, too little has been done.

Should the resolution process even be part of a formal court system? Should it perhaps take another form such as the Swedish Public Complaint Board, or the Polish Community Conciliation Committees? Iran used to have Houses of Equity — community-based, unpaid lay boards entitled to decide most minor civil and criminal cases. Even Sri Lanka has a compulsary conciliatory board composed of local citizens who serve without pay. This tribunal, however, has no adjudicatory power. Many times a neighborhood hassle is only a symptom of a deeper problem. In such cases, community med-arb could be very effective. After all, the original "12 good men and true" always came from the defendant's home locale.

Some of the geographical areas cited are out of the international mainstream, and their approaches may be somewhat unsophisticated, but that very lack of sophistication — that simplicity — is something we should seek out.

In addition to the question of court—non-court sponsorship, someone must decide which disputes can best be handled through med-arb. In doing so we must avoid the practice of even the appearance of reserving "first class" justice for only certain kinds of disputes. Also, although cost savings should be a major consideration in med-arb case selection, litigants' interests might be best served by more costly, more technical court processes.

With Chief Justice Herrmann's support, and with the capable assistance of James Kipp, Esquire, legislation was drafted for me that could very well be the starting point for widespread court-sponsored med-arb in Delaware. Although I don't think it goes quite far enough, I may introduce it in hope that it can at least put in place something that can be modified to fit Delaware's needs as experience dictates.

There is no question that court-sponsored med-arb can be effective. An excellent example can be found in the record of the Superior Court of California, County of Riverside, which in early 1979 had a 24 month waiting time before cases could be heard. In January, 1979, the Court appointed one judge to handle only settlement conferences.

Within 10 months, 614 cases had been settled in such conferences, and many other cases were resolved by lawyers and their clients before scheduled conferences could take place. During that same period the cases concluded by all other judges of that court totaled 54 jury civil trials and 54 nonjury civil trials.

Judge Elwood M. Rich, a 27-year veteran of the bench, was that first settlement conference judge. Share his conclusions:

"More judges, more attaches and more courtrooms are not the answer. They are enormously expensive to the taxpayers and make only a small dent in the civil congestion . . . A settlement conference judge can handle more cases in two weeks by the mediation method than a trial judge can handle by the trial method in a year. More and more mediation is the answer."

Judge Rich went on to say that not all judges can deal with the informality of the settlement conference approach, but that special training in judicial mediation could solve that problem.

Another approach to med-arb is to create a structure totally outside the existing court community. In Delaware the epitome of this approach was HB 66, prepared by Mr. Thomas Alexander and introduced by me early last session. After studying the matter extensively, I became overwhelmed by the sweeping changes wrought by the bill and withdrew my sponsorship. Even so, there was much good in that proposed legislation, which was re-introduced by Sen. Holloway in the last days of the 131st. One philosophical strongpoint was that people agreeing to be bound by a med-arb procedure should do so without the coercive pressures inherent in a court structure.

In any event, the 132nd Delaware General Assembly will be dealing with med-arb legislation. I am confident for two reasons. First, med-arb is an idea whose time has come, and you know what the philosophers say about that. Second, I hope to be a member of the 132nd, and I plan to introduce such a bill.

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Clark Furlow's discussion this month is not so much a case note as a study of a recent opinion by a Committee of the Bar Association. It deals with an important question of legal ethics. The subject could easily lend itself to litigational exploration. The Committee's opinion enjoys, accordingly, a kind of predictive pertinence. It is interesting to compare the views embodied in the Committee's opinion with some of Lieutenant Governor Castle's remarks on the same subject in his article beginning at page 14 of this issue.
The Editors

CASE NOTES

Clark W. Furlow

LEGAL ETHICS: The Lawyer/Legislator

In response to a request by the President of the Delaware Bar Association, the Committee on Professional Ethics has addressed several questions concerning ethical constraints imposed by the Delaware Lawyers' Code of Professional Responsibility on the practice of law by one who has been elected to serve in the General Assembly. In Opinion 1982-5, the Committee concludes that there is no *per se* prohibition against a lawyer/legislator representing the State or against a lawyer/legislator representing a private party (including a criminal defendant) in litigation against the State. The Committee further concluded that the State Senate's role in confirming judicial appointments would not preclude a lawyer/senator from appearing in a State court. The Committee cautioned, however, that a lawyer cannot accept the representation of a client who seeks to use the lawyer's public office to obtain "special advantage." Furthermore, he cannot use his elective office to generate private legal business.

The Committee's Opinion is founded on the proposition that the lawyer/legislator need not conduct himself so as to deflect the suspicions of the most cynical members of the public. Therefore, the Canon 9 injunction to "avoid even the appearance of an impropriety" should not disqualify a lawyer/legislator from a representation except where, on the facts of the specific case, there is a reasonable probability that a specific impropriety has occurred or is likely to occur. This approach is supported by several recent cases; *Church of Scientology v. McLean*, 615 F.2d 691, 693 (5th Cir., 1980); *Wood v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir., 1976); and it is consistent with the Model Rules of Professional Conduct proposed by the American Bar Association Commission on Evaluation of Professional Standards. The Model Rules abandon the principle of "appearance of impropriety" and adopt the notion that a lawyer "should maintain the integrity of office."

Disciplinary Rule 8-108 of the Delaware Lawyers' Code is the touchstone for lawyers who hold public office. It states that a lawyer shall not use his public position to obtain or to attempt to obtain special advantage in legislative matters for himself or for a client, a lawyer shall not use his position to influence or attempt to influence a tribunal to act in favor of himself or for a client, and a lawyer who serves in the legislature shall accept nothing of value given for the purpose of influencing his action as a public official.

Mindful of these principles, the Committee attempted to provide general guidance to lawyers considering public office. First, the Committee concluded there is no *per se* ethical bar preventing a lawyer/legislator from representing the State or one of its agencies. This conclusion is supported by the ABA Committee on Ethics and Professional Responsibility which has stated that "[n]o Disciplinary Rule necessarily prohibits a legislator from being employed in another capacity by the State..." ABA, Committee on Ethics, Informal Opinion 1182 (1971). The Committee also noted that the Delaware Constitution's prohibition against a member of the General Assembly holding another state "office," Del. Const. art. II, sec. 14, is not to be read as a blanket prohibition against a legislator being employed by the State in another capacity, but as a bar against holding another official

The legislative session lasts only fifty to fifty-five days a year, and a member is paid $11,400. Few lawyers will run for elective office if their legislative responsibilities leave them so tied down by ethical prohibitions that they must sacrifice their legal careers.

position. *Opinion of the Justices*, Del. Supr., 245 A.2d 172 (1968). Accordingly, there is no constitutional prohibition against a Delaware legislator's acting as an attorney for the State.

Nonetheless, the absence of a prohibition against representing the State is by no means the end of the matter. The lawyer is subject to the caveat of DR 8-101 that he must not use his public office to promote his private business.

The Committee also considered the extent to which a lawyer/legislator may litigate against the State. It concluded that a lawyer who has been elected to the General Assembly may represent private suitors in court, even when they oppose the position of the State or its agencies. The Committee reasoned that there is no apparent conflict of interest under these circumstances because a member of the General Assembly represents *not* the State government, *but his constituents.*

The Delaware Committee also held that a lawyer/legislator may defend a person charged with a crime or a traffic offense. This is also the position of the American Bar Association, which has concluded that a part-time legislator may represent criminal defendants in state courts when the legislature is not in session, provided he does not use his position to repeal or amend existing laws for the benefit of his clients. The ABA cautions that a lawyer should not undertake such representation if he subjectively determines that it will impair his impartiality toward proposed criminal legislation. ABA, Committee on Ethics, Informal Opinion 1126 (1969).

The willingness of the Delaware Committee to sanction a lawyer/legislator's defense of an accused criminal represents a sharp change from its position in Opinion 1980-4. At that time, the Committee concluded that a lawyer would be prevented from representing criminal defendants if he were elected to serve as Lieutenant Governor of Delaware. The Committee reasoned that the Lieutenant Governor should not "lend the weight and prestige of high public office to the representation of a criminal defendant. [S]uch a representation would undercut the prosecution and quite properly perplex the jury and the public." The Committee's present opinion, consistent with the new standard, emphasizes that the mere possibility of an *appearance of impropriety* is not enough to disqualify the attorney. Furthermore, the case of the lawyer/legislator is different from that of the Lieutenant Governor, who serves as the president of the Board of Pardons.

A lawyer elected to serve in the Delaware Senate faces a special ethical problem: The Senate affirms appointees to the judiciary and some members of the executive branch, Del. Const., art. IV, sec. 3; art. III, sec. 9. Although the Senate's role in the reappointment of judges whose terms expire after twelve years service may strike some as giving rise to opportunities for improper legislative influence, the mere possibility of impropriety should not bar the lawyer/senator from appearing in courts; rather, the *probability* of impropriety must arise before the lawyer must disqualify himself. The ABA Committee on Professional Ethics has reached a similar conclusion in the case of a lawyer serving in the United States Congress. His election does not prevent him from continuing to represent a litigant in the federal courts. ABA, Committee on Ethics, Informal Opinion 287.

The Committee stressed, however, that the lawyer/senator's conduct in court must be governed by DR 8-101, which prohibits the lawyer from using his public position to influence or attempt to influence the tribunal to act in favor of his client. The Committee's resolution of this point is consistent with that of the Illinois Bar Association's Committee on Professional Ethics. That Committee held that a lawyer/legislator had acted improperly when he "implied" during a proceeding before a magistrate that he was considering a bill to raise the magistrates' salaries. Opinion 324, 58 Ill. B.J. 268 (1969).

The lawyer/legislator's role as a litigator is also limited by the possibility that he may have acquired

THE BANKS ARE COMING!

BY TERRY A. STRINE, CCIM

The Banks are coming! The Banks are coming! The Financial Center Development Act (FCDA), and the financial institutions now committing to Delaware truly represent a *"tide which will lift all ships."*

Bad politics in the late 60s — early 70s cast a pall (shroud?) over Delaware's growth and economic stability. For much of the past decade, Delaware suffered under an anti-business reputation. Companies — and jobs — went elsewhere.

But those days are behind us. Good government in Dover and Wilmington — a truly bipartisan effort — has re-established fiscal responsibility, brought spending and capital budgets under control, and lowered tax dis-incentives for the movers and shakers. Wilmington and the State have held out a helping hand to industry and developers, saying "let's move ahead together." In short, we changed our message from "can't do" to "can do."

And building upon all this is the FCDA. Courageous, enlightened, well conceived, whatever adjectives you apply, it's working beyond anyone's expectations. By last count, over a dozen financial institutions have already committed to Delaware. Each must provide 100 new jobs within its first year of operations. Some are planning to move major divisions here, possibly involving thousands of jobs. And the momentum is building. Major national banks, trust companies, insurance companies and international banks are among those taking a fresh look at Delaware.

A thousand new jobs are sure to grow to several thousand, then hopefully, many thousands. Each new job affects every area of our economy — and *real estate* in particular. Sure, they will occupy new office space, or absorb older existing office buildings. They will also eat in new restaurants, shop in new stores, live in new homes. These jobs will bring new families to our state, and add to the income of families already here. Standards of living will rise. Every type of real estate will be in greater demand. Demand impacts value — positively. Soon you'll be reading articles about greater Wilmington with attention-getting topics such as "City on the Grow," "quality, affordable living at its best," etc. And the demand will grow . . . and grow. Real estate values will grow . . . and grow. Get aboard. There'll be lots of money to be made by all.

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special information in his role as a legislator which might be adverse to the interest of the State in a particular case. If he has, the possession of such information would create a conflict between the lawyer/legislator's public duty and the private interests of his client. Under such circumstances, the lawyer/legislator must withdraw from representation.

The freedom allowed a lawyer/legislator to litigate in the State courts stands in contrast to his ability to act as a lobbyist. Disciplinary Rule 8-101 (A) (1) forbids a lawyer to use his public position to obtain a special advantage in legislative matters for a client. Thus, the Rule squarely prevents the lawyer from *lobbying* the cause of a private client. However, DR 9-101 (A) (1) does not create a blanket prohibition against supporting legislation that may affect a client's interest. Few pieces of legislation do not affect the interests of some clients of a busy lawyer. Therefore, the Committee concluded that DR 8-101 does not prohibit a lawyer from *supporting* a bill of general interest to the public, even though the bill happens also to affect the interests of one of his clients, so long as he has not been retained by the client to do so.

The Committee also emphasized that a lawyer/legislator should be mindful of Ethical Consideration 8-1 which advises: "Lawyers . . . should propose legislation and other reforms . . . without regard to the selfish interest of clients." Thus, when the public interest requires, the lawyer/legislator must be free to follow his conscience, even though the direction may not please some of his clients.

Finally, the Committee considered whether the disqualification of the lawyer/legislator required the disqualification of other members of his firm, and followed the general rule that the disqualification of one lawyer extends to the others practicing in the same firm. However, the American Bar Association Committee on Professional Ethics has recognized that under certain circumstances the public can resolve the conflict by giving its consent. Where a state, by constitution or by statute, authorizes a legislator to disclose the existence of a conflict of interest and to abstain from voting on the matter, the public will be deemed to have waived its right to object to the conflict created when a member of his firm lobbies before the legislature.

In Delaware, Article II, Section 20, of the State Constitution is virtually identical to the provision under consideration in the ABA opinion. Thus, for purposes of lobbying, it would appear that Article II, Section 20, will be deemed to constitute the public's consent to the lawyer/legislator's abstention from the matters in which his firm represents interested parties.

The problem with this solution is that it forces on the lawyer a Hobson's choice. When his firm has been retained to lobby a client's cause before the General Assembly, the lawyer/legislator must decide whether to abstain and thereby disenfranchise his constituents, or in the alternative, deprive his partners and associates of a potentially lucrative representation. Save for exceptional circumstances, all doubts should be resolved in favor of the public interest.

Delaware is the only one of the fifty states to have no lawyers presently serving in its legislature. In Delaware, service in the General Assembly is a part-time position. The legislative session lasts only fifty to fifty-five days per year, and a member is paid $11,400. Few lawyers will run for elective office if their legislative responsibilities leave them so tied down by ethical prohibitions that they must sacrifice their legal careers. The Delaware Ethics Committee's opinion, although merely advisory and not binding precedent, provides useful, if necessarily limited, guidance to lawyers considering public office.

The great virtue of the opinion is the Committee's willingness to confront some very prickly problems, which, if unsolved, would seriously restrict the profession's involvement in our public life.

Nonetheless, the Committee's decision leaves many questions unanswered, and, by furnishing only broad outlines, it puts off resolving specifics, leaving them for decision case by case. □

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The Editors

BOOK REVIEW

WOMEN IN LAW
by Cynthia Fuchs Epstein
(Basic Books; 438 pages; $18.50)

SKIRTING THE LAW

Helen L. Winslow

Cynthia Fuchs Epstein originally chose women attorneys as the subject of a sociological study in the early 1960s because, as members of an almost exclusively male profession, they formed a statistically "deviant" group. At that time less than 3.3 percent of the legal profession were women. By the time Ms. Epstein's Ph.D. dissertion was completed (in 1968), the makeup of the profession had changed dramatically. During the 1970s, Ms. Epstein, now a professor of sociology, continued to interview and study women attorneys, and the result is *Women in Law*, a book of interest not only to social scientists and members of the group studied, but to anyone interested in the legal profession.

Unlike many sociological studies, *Women in Law* emphasizes actual interviews with women attorneys. Statistical sampling is secondary. Many of the views of the women interviewed are given verbatim, and the result is engaging.

After summarizing the history of the legal profession in the United States (in itself fascinating) and describing the historical role of women in the profession, Professor Epstein presents a sociological analysis of the background of women attorneys. Interesting findings abound. For example, although attorneys generally tend to have well-educated parents, Professor Epstein finds that the parents of women attorneys are generally better educated than those of men attorneys. In the past, many women followed their fathers' or their husbands' footsteps in entering the legal profession, but beginning in the 1960s, peer pressure from fellow college students became a significant additional influence.

Professor Epstein also discusses her findings with regard to women in various types of law practice: government attorneys, solo practitioners, poverty and public interest attorneys, attorneys working for feminist causes, Wall Street attorneys, law professors, and judges. Her study of Wall Street attorneys confronts the problem of tokenism, in which "one or a few members of an undesirable group are accepted by an in-group in order to counter criticisms of discrimination without a genuine commitment to accept all qualified candidates from the undesired group." She also describes the distinctive characteristics of those Wall Street firms that have succeeded in overcoming tokenism in hiring and promotion.

"Tokenism: That state of affairs in which 'one or few members of an undesirable group are accepted by an in-group in order to counter criticisms and discrimination without a genuine commitment to accept all qualified candidates from the undesired group.'"

Some personal issues traditionally associated with women, including the balancing of careers with personal relationships, are also discussed. One of Professor Epstein's most interesting findings is that almost all of the women attorneys studied were married to attorneys. Highly successful women attorneys have been much more apt to be married than women attorneys generally, usually to men who are themselves highly successful attorneys. Women who are more successful in their careers than their husbands, however, have encountered marital stress as a result. Women attorneys have achieved widely varying adjustments between career and children. One woman attorney reported working school teachers' hours, so she could be home with her children after school. At the other end of the spectrum, several Wall Street attorneys gave birth to their children during their four-week summer vacations and then returned to work at full steam. Epstein treats such other topics as the remaining professional ambivalence towards women, the development of their confidence and skill in self-presentation, and handling the long hours demanded of attorneys.

The statistics in *Women in Law* furnish support for the conclusions Professor Epstein draws from her interviews, but they are interesting in their own right. Compare some of these statistics with very rough Delaware statistics: in 1980, 12.0 percent of American lawyers were women. The 1982 Delaware Legal Directory, however, shows that only 8.6 percent of the members of the Delaware Bar are women. Of these, at least 54 percent have been admitted to the Delaware Bar since 1970. The largest identifiable group of women members of the Delaware

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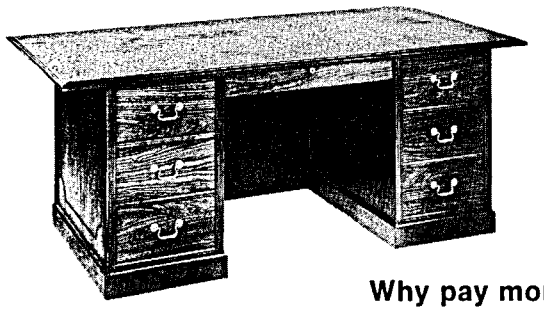

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Bar are government attorneys and those who practice alone or with firms of less than five attorneys—approximately 23 percent and 29 percent, respectively. The high percentage of government attorneys and solo practitioners in Delaware is consistent with Professor Epstein's national findings.

Although generally Professor Epstein's conclusions seem thoughtful, serious and valid, many attorneys will find a few of them amusing. For instance, after noting that many of the desks on Wall Street are bare of even a single piece of paper, Epstein observes: "It seems fair to say the poorer the lawyer, the more cluttered the desk." Delaware attorneys, look to your desks!

The author's editorial comment conveys her high respect for the women attorneys she has studied and her feeling that they are more confident and secure than women professionals in some other fields. One comes away from each chapter with the sense that many of the women have benefited by entering the legal profession and that the profession has benefited by their presence. This is a heartening book! □

(With thanks to Mrs. Anita Garvey for helping with the Delaware statistics)

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Helen L. Winslow, our first woman contributor—first of many, we trust—practices law with the Wilmington firm of Richards, Layton & Finger. Helen is a graduate of Bryn Mawr College and the law school of the University of North Carolina. Before coming to Richards, Layton & Finger, Helen clerked with the United States District Court for the District of Delaware. Helen is an accomplished and enthusiastic athlete and, in her more reflective moments, an acute observer of the role of women in our changing society.

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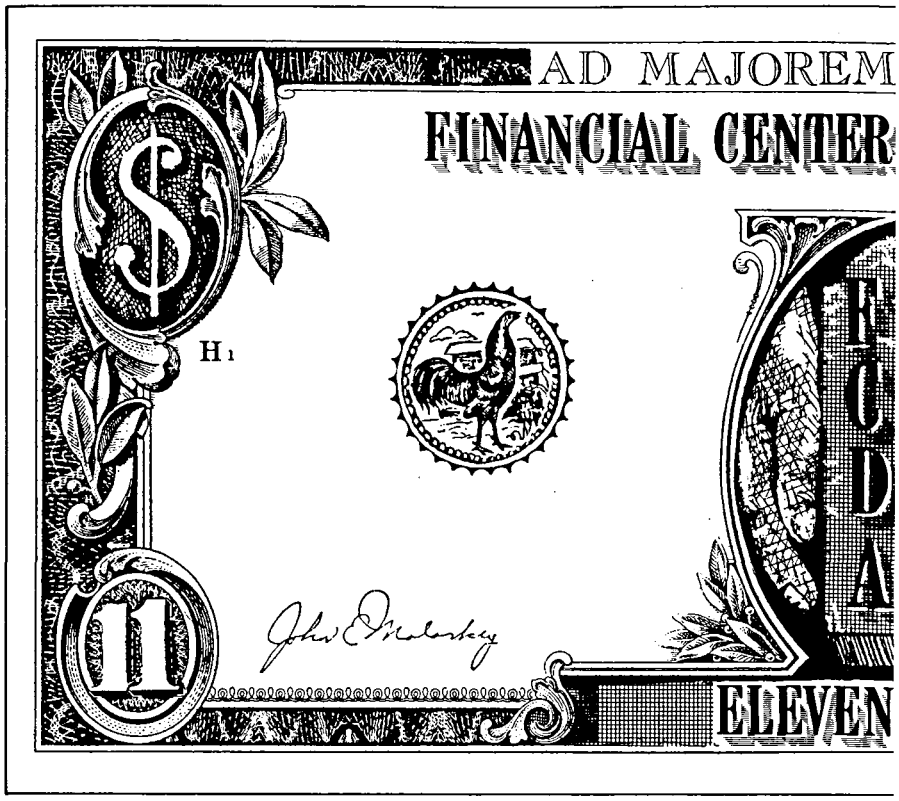


BIRTH OF A BANKING BONANZA

David C. McBride

By now, nearly everyone has heard of it.

It is jobs and economic development without the threat of pollution, urban renewal without government subsidy, a tax advantage for large banks with a revenue gain for the State, and a significantly deregulated credit market that promises to assure a supply of credit when and where needed.

It is the FCDA — Financial Center Development Act. And the summer cover of a Delaware publication recently trumpeted that the banks are "charging" into Delaware. But, unless you are one of the lawyers, businessmen or politicians who helped to hatch this golden egg, you may have heard more than you have seen, and understand it all even less. So, if you are feeling bewildered by the greatest economic development project to hit Delaware since a family named duPont, this article is for you. Where are the banks and how did they get here? Read on.

The Act

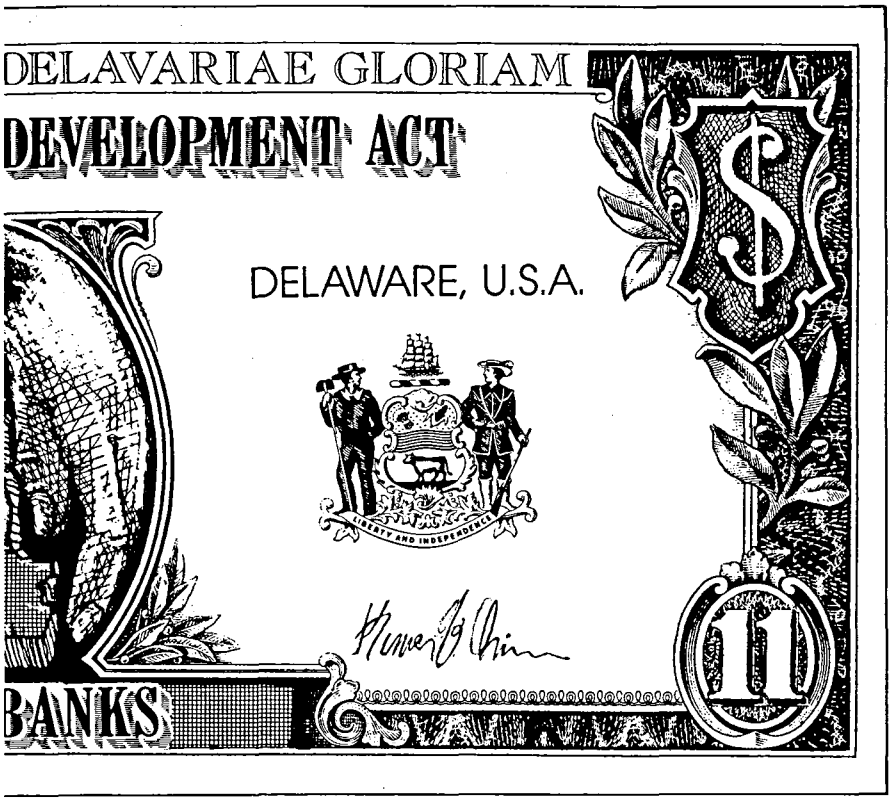
Enacted by the Delaware General Assembly in February of 1981, the FCDA has made Delaware attractive to financial institutions seeking to share in the growing phenomenon of interstate or regional banking. By removing many of the long-standing restrictions and controls on the extension of credit by banks and trust companies, including a complete elimination of interest rate ceilings, and providing a declining tax rate on bank net income, the Act has attracted a number of banking and financial institutions to Delaware which will conduct a variety of interstate operations from Delaware. Because of conditions imposed on the entry of these institutions into Delaware, these new Delaware institutions will provide direct employment for hundreds of Delawareans and a promise to spur building activity in Wilmington and throughout the state. Already, Wilmington, Newark, Dover and Millsboro have been graced with the presence of at least one of these institutions.

There are three principal provisions of the FCDA which have produced these progeny.

Most fundamental, the Act deregulates the permissible terms of credit agreements, including interest rates, to permit "the market" greater freedom in setting those terms. Ceilings on the interest rates which banks may charge on loans and credit cards are entirely eliminated, as are ceilings on automobile loans, secondary mortgages, small loans and retail installment sales. The interest rate may be variable and the variable rate may apply to outstanding balances. And the banks are free to charge a variety of fees in connection with the credit agreement, such as membership fees, minimum fees and late charges. This freedom is one of the major attractions of the Act because, under federal laws, the

(Continued, Page 36)

David McBride, of the Board of Editors of DELAWARE LAWYER, is a member of the firm of Young, Conaway, Stargatt & Taylor. Dave is a member of both the General Corporation Law and Commercial Law Committees of the Delaware Bar Association.



TWENTY MONTHS LATER AND BEYOND

David B. Ripsom

On February 18, 1981, just before he signed the Financial Center Development Act (the "FCDA" or the "Act") into law, Governor Pierre S. du Pont, IV observed:

"Today, Delaware steps forward as the nation's newest center of business and finance. We are doing so, first, because we want to enhance our State's economy and secure more and better jobs for our citizens, and second, because we can see that there are major changes occurring in the way the nation does its banking and its business."

Has Delaware attained its objectives in adopting the legislation? What do the new (and old) bankers in Delaware think? Has national banking really changed, and, if so, has Delaware done enough to adapt to a changed banking environment?

The New Banks

The hard facts are impressive. Today, Delaware has 11 new banks which have begun or are in the process of beginning operations. General information about each is set forth in the boxed chart.

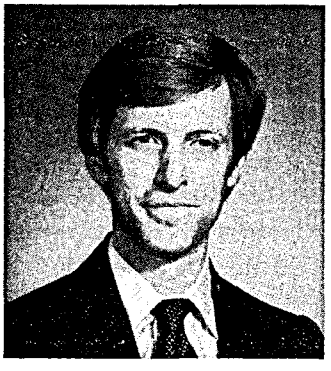
The FCDA banks generally fall into two categories. The five largest New York banks constitute one. The four Maryland and two Pennsylvania banks, the second. While all share the common thread of the FCDA, their reasons for being here and thus their operations differ. Some specialize in one aspect of the banking market. Others use their Delaware operations for a broad range of banking services. For example, Morgan Bank (Delaware) does a national wholesale banking practice exemplified by its participation with its parent bank in a two hundred million dollar credit agreement with the Pioneer Corporation of Texas. Chase Manhattan emphasizes a nationwide consumer business with a mail loan solicitation campaign to attract new consumer credit accounts. Most of the Maryland and Pennsylvania banks have concentrated in operating their credit card services from Delaware to avoid the interest ceilings and other charge limitations imposed by their home states.

On March 31, 1982, Delaware domestic banks, i.e., non-FCDA banks, had approximately 4.8 billion dollars in total assets. FCDA banks *already* have approximately 1.25 to 1.5 billion. It appears only a matter of time, probably a relatively short time, before the FCDA bank assets exceed those of domestic banks. For example, Chemical Bank Delaware estimates that its demand deposits and purchased funds should exceed two billion dollars by the end of 1982 or shortly thereafter.

The Impact Upon Delaware

The public sector is obviously pleased with the response to the FCDA. While Chase and Morgan had committed to Delaware before the legislation passed and there was substantial other interest, it has been

(Continued, Page 56)



David B. Ripsom is a member of Prickett, Jones, Elliott, Kristol & Schnee. He conducts an active corporate and banking practice. David graduated from Lafayette College in 1971 and received his law degree from the University of Virginia in 1974.

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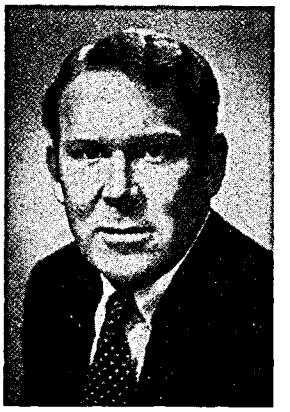

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FINANCIAL CENTER DEVELOPMENT ACT (FCDA)

Banks Locating to the State of Delaware

Parent Bank or Holding Company	Delaware Bank	Start-up Date	Type of Business
J. P. Morgan & Co. Incorporated Holdings Corp. New York, NY	**Morgan Bank (Delaware)** 900 Market Street Wilmington	December, 1981	Wholesale banking business.
The Chase Manhattan Corporation New York, NY	**The Chase Manhattan Bank (U.S.A.), N.A.** 600 Market Street Wilmington	January, 1982	National consumer lending business and mail order campaign.
Citicorp New York, NY	**Citibank (Delaware)** One Rodney Square Greater Wilmington Airport Wilmington	September, 1982	Full range of Cash Management Services to institutional customers nationwide.
Provident National Corporation Philadelphia, PA	**Provident of Delaware Bank** 105 Foulk Road Wilmington	March, 1982	Participation in providing an integrated financial services program to investors; wholesale and consumer lending and international business.
Maryland National Bank Baltimore, MD	**Maryland Bank, N.A.** Routes 273 & 4 Ogletown Newark	March, 1982	Credit card program.
First Maryland Bancorp Baltimore, MD	**First Omni Bank, N.A.** Mitchell Street Millsboro	January, 1982	Credit-debit card activities.
Philadelphia National Corporation Philadelphia, PA	**Philadelphia Bank (Delaware)** 103 Foulk Road Wilmington	May, 1982	Transfer Philadelphia National Bank's VISA credit card program & expand & promote regionally.
Equitable Bancorporation Baltimore, MD	**Equitable Bank of Delaware, N.A.** Rodney Village Shopping Center Dover	June, 1982	Emphasis on bank debit and credit card services.
Suburban Bank Bethesda, MD	**Suburban Bank of Delaware** Richardson Building 800 Silver Lake Blvd. Dover	Fall, 1982	Retail banking and consumer credit operations.
Chemical New York Corporation New York, NY	**Chemical Bank (Delaware)** One Rodney Square Wilmington	September, 1982	Domestic and international wholesale banking.
Manufacturers Hanover Corporation New York, NY	**Manufacturers Hanover of Delaware**	First Quarter, 1983	Domestic and international wholesale banking.

Source: Office of State of Delaware Bank Commissioner.

BIRTH OF BANKING
David C. McBride
(Continued from Page 32)

Delaware statute will apply even to credit transactions undertaken by the FCDA banks outside Delaware.

Adding to the incentives of a relaxed regulatory climate are significant tax incentives contained in the Act. Before its adoption, Delaware banks paid a flat tax of 8.7% on net income. The Act reduced the tax rate on income in excess of $20 million. While none of the pre-existing Delaware banks had or have sufficient income to benefit from this reduction, and consequently tax revenues from these banks have not been impaired, the reduced rate, which is as low as 2.7% on income in excess of $30 million, is attractive to large financial institutions presently located in states with higher taxes. Even at these low rates, the revenues from these new banks locating in Delaware still promise to enhance the State treasury with dollars which would otherwise not have been realized.

Having made Delaware attractive to banks, the Act also provides the mechanism permitting them to locate in Delaware, but only on conditions that ensure economic development for the State and do not injure existing Delaware banks. To accomplish this objective, Delaware took the almost unprecedented step of permitting an out-of-state bank holding company, such as Citicorp, to acquire a banking subsidiary in Delaware. Historically, federal and state law have prohibited banks from branching across state lines or, through a holding company, acquiring banks in another state. However, the federal restriction on bank holding company acquisitions may be overridden by a state law that specifically permits a bank holding company to acquire a bank in state.

Delaware has permitted such acquisitions, but only on certain conditions. The bank to be acquired must be a newly-chartered bank which will operate only one office, and that office must be operated in a manner and at a location not likely to attract business from the general public. That is why these new banks are sheltered in unassuming locations around the State. Also, the new bank must have initial capital of $10 million, increasing to $25 million within a year. Finally, and most important, each new bank must employ at least 100 persons in Delaware.

In the great American legislative tradition, the Act tries to provide something for everybody, and it largely succeeds. The banks are free to continue to extend credit on terms that are profitable, the State garners new tax revenues, and the general public benefits with hundreds of new jobs which, it is hoped, will spur business and building throughout Delaware. The Act is a political success, and has become the crown jewel of the duPont Administration. As one member of that Administration has stated, the FCDA is now a "sacred cow" in Delaware, beyond criticism. The legislature is only too happy to continue to accommodate the influx of financial institutions, and no one tangentially involved in the process of adopting the Act is reluctant to take credit for the bonanza.

"In the great American legislative tradition, the Act tries to provide something for everybody, and it largely succeeds. The banks can extend credit on profitable terms, the State garners new tax revenue, and the general public benefits with hundreds of new jobs. The Act is a political success."

But the FCDA is not truly a Delaware product, and its history is a story of an opportunity almost lost, as much as it is a story of an opportunity ultimately seized.

The History Of The Act

It all began when the First National Bank of Omaha, located in Omaha, Nebraska, started enrolling Minnesota residents in its BankAmericard Plan. Under Nebraska law, the bank was permitted to charge interest rates as high as 18% per year on the credit cards, but under Minnesota law the maximum interest rate was only 12%. The issue for the United States Supreme Court was whether First National was permitted to charge Minnesota residents the interest rate allowed by its home state, Nebraska, or whether it was restricted to the interest rate allowed by the card holder's home state, Minnesota. Construing a Federal law permitting national banking associations to charge the interest rate "allowed by the laws of the state ...where the bank is located", the Supreme Court concluded that the Omaha bank, because it was located in Nebraska, could charge its Minnesota customers the higher Nebraska rate, thus avoiding the usury limits of Minnesota law.

When the Supreme Court opinion was rendered in late 1978, the First National Bank of Omaha was far from the only bank soliciting credit card customers across state lines. In August 1977, New York's Citibank, which had over 1 million MasterCard holders in metropolitan New York, conducted a mass solicitation of VISA customers in 25 states. By 1980, Citibank had issued as many as 5.8 million VISA and MasterCards with at least 25,000 in each of the 25 states targeted for solicitation. After the Supreme Court's decision sustaining Nebraska interest rates for Minnesota residents, it became possible for a bank with an interstate network of credit card holders to "export" its home state law to govern the credit terms, or at least the interest rate terms, applicable to those credit cards. The next and obvious step was to locate the bank's credit card operations in a state with favorable laws governing the terms of the credit arrangement.

By 1980, Citicorp, the holding company for Citibank, had found a state in which to base its credit card operations — South Dakota. Citicorp had made an initial overture to Missouri, which was defeated by opposition from local bankers. But South Dakota, responding to promises that Citicorp would create hundreds of new jobs in that state, eliminated its usury restrictions and became the first state to allow out-of-state bank holding companies, such as Citicorp, to organize a banking subsidiary within the state.

It was not until Citicorp was well on its way to South Dakota that Chase Manhattan, another New York bank, approached Delaware about pursuing the same course as South Dakota. Apparently, bank executives were not eager to follow their Citicorp counterparts to the

land where the buffalo roam, and they began to search for a more hospitable climate. Following the metroliner tracks south from New York City a mere hundred miles, the New York bankers found Delaware, a state already noted for its hospitable corporation law and for a climate somewhat more attractive than South Dakota's.

Chase first inquired about Delaware in the Spring of 1980. Chase officials visited with officers of each of the major local banks. Of these, only the Bank of Delaware was encouraging. The other banks were either neutral or opposed. Chase retained a major Wilmington law firm who advised it that there were serious legal problems in coming to Delaware on the terms Chase wanted. Chase started to look elsewhere, and prepared to drop its pursuit of a Delaware site.

At the urging of Jeremiah Shea, President of Bank of Delaware, Henry Beckler, head of that bank's corporate business development division and a former officer of Chase, began calling acquaintances at Chase. He encouraged Chase to return to Delaware, and he, Shea, and Richard Eckman, then with Bank of Delaware's legal department, arranged a series of meetings between Chase officials and prominent Delawareans.

They met first with du Pont administration members David Swayze, then Executive Assistant to the Governor, Peter Nellius, and William Manning, counsel to the Governor. Next they met with Irving Shapiro, then Chairman of the Board of E. I. du Pont de Nemours & Company and now a partner in the Wilmington office of Skadden, Arps, Slate, Meagher & Flom.

In an effort to gain support from Wilmington city Democrats, Shea arranged a luncheon meeting attended by Chase officials and David Singleton, Administrative Assistant to Mayor McLaughlin, and O. Francis Biondi, a member of Morris, Nichols, Arsht & Tunnell. After lunch, the group traveled to Dover to meet with John Malarkey, the State Banking Commissioner, with the Governor, and finally, with the Board of Directors of the Delaware Banking Association, a group on which nearly every bank in Delaware had representation.

Chase's opportunity to present its proposal to the Association was arranged by Henry Beckler. Present at the meeting were Fred Frear, then a Vice President at Delaware Trust and now with Peoples Bank, David Jones, an Executive Vice President of the First National Bank of Harrington, Loren Frye, a Vice President at Wilmington Trust, Robert Hoyt, Chairman of the Sussex Trust Company, Leslie Wix, a Vice President at the then Farmers Bank, Ralph Williams, then an Executive Vice President at Peoples Bank and now President of First Federal Savings and Loan, Henry Dukes, President of the First National Bank of Harrington, John Porter, President of Delaware Trust, Elizabeth J. Lattanzio, President of the First National Bank of Wilmington, and James Jackson, Executive Vice President of the Association.

Like their counterparts in most states, some Delaware bankers were hesitant.

At that meeting, Chase's senior officers proposed that Delaware, like South Dakota, allow out-of-state bank holding companies, such as Chase Manhattan Corp., to acquire banks within Delaware. Chase said it wanted to relocate its credit card operations and that it was considering a number of states, including Delaware. The proposed legislation prepared by Chase, unlike the final Act, contained no restrictions on the operations of the banks acquired by out-of-state holding companies and did not eliminate the Delaware usury restrictions. The initial reaction of the Association was predictably cautious and unenthusiastic.

To Delaware bankers, the Chase proposal was revolutionary. It envisioned opening Delaware to interstate banking — long opposed by most banks except the largest money center banks seeking nationwide operations. There were a variety of reasons given for preserving the existing limitations on banks expanding across state lines: local banks might be more responsive to local needs, local banks were less likely to cause capital to flow out of the state, smaller banks doing only local business might be better judges of local credit risks, and smaller banks could be more easily regulated.

But these perceived advantages, subject to serious questioning by proponents of interstate banking, were being swept aside by the inexorable movement toward increasing interstate banking and integration.

(Continued)

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Banks were soliciting credit holders nationwide or regionally, establishing loan production offices in various states, providing cash management and data processing services to businesses in many states, and extending ATM systems (automatic tellers) across state lines. Pressured by the interstate scope of competing financial institutions, such as brokerage firms like Dean Witter and Merrill Lynch, the banking industry was moving toward interstate banking, and, in the spring of 1980, the U.S. Department of the Treasury was preparing a report, ultimately delivered to the President in January of 1981, recommending a phased relaxation of federal restrictions on interstate banking. It was this accelerating parade to interstate banking that the Delaware bankers were being asked to lead. Like their counterparts in most states, some Delaware bankers were hesitant.

After that initial meeting, the Association assigned Chase's proposal to its Governmental Affairs Committee, headed by Joseph Moran, an attorney and Senior Vice President at Wilmington Trust. The Chase officials left the meeting convinced that their prospects for bringing interstate banking to Delaware were not good. A number of other participants agreed, and a "slow death" in committee might have been the final result. However, word of the Chase proposal began to circulate within the business community, and when Alexander Giacco, Chairman of Hercules, and Irving Shapiro learned that the proposal might be "studied to death", they took action.

Giacco spoke with the duPont Administration, which, according to a number of participants had not been very helpful in the early development of the Chase proposal. Giacco complained that a great opportunity might be lost. In addition, he and Shapiro met with senior officials at Chase in a successful effort to persuade Chase not to forsake Delaware. These efforts to keep the proposal alive resulted in a June luncheon meeting at the Wilmington Club attended by Governor duPont, members of his Administration, including Glenn Kenton, Secretary of State, Nathan Hayward, then Director of Management, Budget and Planning and now the Director of the Delaware Development Office, David Swayze, Chase officials, Jeremiah Shea, one of the earliest supporters of the proposal, Mayor William McLaughlin of Wilmington, Singleton, Biondi, Giacco and Shapiro. Wilmington Trust, which at that time was not supporting the idea, was not invited to the luncheon and sent no representative.

At the meeting Chase officers announced that Chase was being pressed by its Board of Directors to move the Bank's credit card operations to South Dakota, where Citibank had recently sought refuge. Chase presumably preferred the Delaware location and was willing to commit to relocating that operation in Delaware if Delaware would amend its laws as South Dakota had done. While the duPont Administration made no committment to Chase, the Governor appointed an unofficial "Bank Task Force", consisting of Glenn Kenton, David Singleton, Frank Biondi, Donald Kirtley from Hercules, William Wood from DuPont, Henry Beckler, John Malarkey, the State Bank Commissioner, Nathan Hayward, and David Swayze, to pursue the Chase proposal and draft the necessary legislation.

Chase officials left the meeting convinced that their prospects for bringing interstate banking to Delaware were not good. A number of other participants agreed, and a "slow death" in committee might have been the final result.

One of the Task Force's initial problems was to cement and, in the case of Wilmington Trust obtain, the support of local bankers for the Chase proposal. Irving Shapiro undertook to speak with officers of Wilmington Trust, and Alex Giacco was to pursue Delaware Trust's support. At the same time, Frank Biondi undertook to draft the proposed legislation.

According to Joseph Moran of Wilmington Trust, that bank was never actively opposed to the Chase proposal. Moran contends that Wilmington Trust wanted a legal opinion from Chase that the restrictions proposed on the operations of the new FCDA banks were legally valid. That opinion was not received by Wilmington Trust until late July.

By mid-August, all the major local banks, including Wilmington Trust, supported the proposal. As draft legislation proceeded, some of the banks began to perceive benefits in the proposed legislation and began to appreciate that the restrictions in the legislation, and the disinclination of the out-of-state banks to conduct retail banking in Delaware, would minimize, if not eliminate, the perceived competitive threat. In addition, as the economic development potential of the proposal became increasingly apparent, the local banks were less willing and, in a political sense, less able to block it. By August, Joe Moran of Wilmington Trust and Richard Eckman, then an attorney with the Bank of Delaware and now general counsel of Chase's Delaware subsidiary, became involved in the effort to draft legislation.

Once the support of the banking and business commities had coalesced, the Task Force turned to the legislative process. The duPont Administration informed a variety of legislative leaders of the Chase proposal, but the Administration did not want the proposal to be publicized for fear that it would become a campaign issue in the 1980 elections. According to several members of the Administration, the local newspapers learned nothing of what was occurring until after the election. The Administration started planning to submit the legislation to the General Assembly in a special January session. The purpose of the special session was to prevent the proposal from becoming encumbered in the "horse-trading" that typically occurs in the regular session.

In September, draft legislation had been prepared and submitted to the Delaware Bankers' Association at a meeting at the Governor's Mansion in Dover. At that meeting Governor duPont spoke in favor of the bill, Irving Shapiro explained that the banking law could attract banks to Delaware, just as our corporation law attracts corporations. Alexander Giacco spoke of the economic develop-

(Continued, Page 54)

Part of Delaware's past... Part of Delaware's future.

Nearly two centuries ago, a bank by the name of Bank of Delaware opened its doors at Fourth and Market Streets. The present day Bank of Delaware is the successor to the business of that bank organized in 1795.

In the years since then, financial institutions such as the National Bank of Delaware, the Security Trust and Safe Deposit Company and the Equitable Guarantee and Trust Company have all played a part, through merger, name change and acquisition, in Bank of Delaware's past.

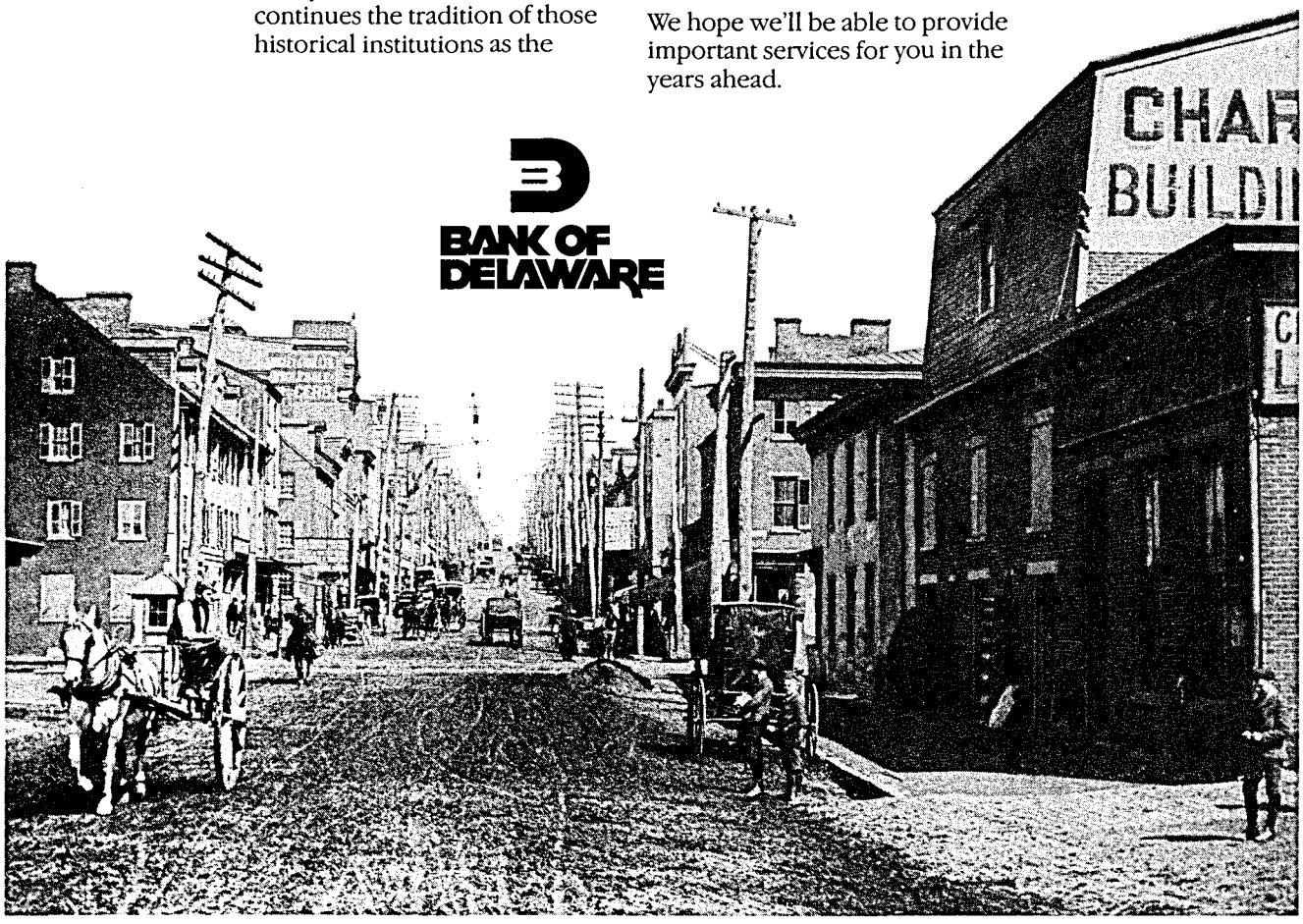
Today, Bank of Delaware continues the tradition of those historical institutions as the bank where Delaware's people and businesses know they can turn for financial assistance of all kinds.

We are especially proud of the strong support provided to Delaware business in the form of commercial and industrial loans, and of the help we have given to individuals in reaching their personal goals.

In short, all the institutions which form part of Bank of Delaware's history have helped Delaware turn two centuries already. Now, we're ready to help Delaware turn the next one.

We hope we'll be able to provide important services for you in the years ahead.

BANK OF DELAWARE



Looking north on Market Street from Front Street in the late 1800's.

The Future of Lawyer Advertising

Edwin Golin and Ze'ev Golin

"The law is the true embodiment of everything that's excellent. It has no kind of fault or flaw, and I, my Lords, embody the Law."
W. S. Gilbert, Iolanthe

In 1932, the winning definition in a contest sponsored by *Advertising Age* described advertising as "The dissemination of information concerning an idea, service, or product to compel action in accordance with the intent of the advertiser."[1] Going back even further, advertising was first defined by Matthew (V, 16) who said "Let your light so shine before men, that they may see your good works."

Let's face it. The image of advertising itself radiates few shining lights. Wherever or however an advertisement appears, its primary purpose is to arouse a desire for a product or service. Although that is straightforward enough, today's promotional techniques for whetting the public's appetite would probably give Saint Matthew a few qualms.

In an effort to compel action, the advertiser pits the best writing and graphic talents against the defenses of the prospective consumer. And while most consumers are aware that the persuasive messages are the self-serving efforts of the advertiser, they also have a human need to yield to the enticements; to enjoy owning sportier cars, designer clothes; to have sweeter breath and shinier teeth.

Where does *lawyer* advertising fit into all this? In the Yellow Pages, it fits between Lawn Mowers and Layettes. And what you find between those headings is an enlightening preview of the future of lawyer advertising.

Before the 1977 Supreme Court ruling in Bates vs. the State Bar of Arizona, lawyers generally were limited to specialty listings in publications such as the telephone directory. Occasionally a firm would place a small, dignified display advertisement in the financial section of the local paper announcing the addition of a partner. These notices were so spartan in copy and design they were dubbed "tombstone" advertisements.

Now, with restrictions lifted by many state bar associations, more lawyers are merchandising themselves. A cursory survey of the 1981 Yellow Pages in a dozen cities indicates that lawyer advertising is catching hold nationwide. In New Castle County (Delaware), with a population of less than 400,000, there are 58 display ads and descriptive "box" listings in the lawyer's section of the phone directory.

The most popular specialties promoted in the Yellow Pages by lawyers nationally are the high-turnover procedures involving divorce, bankruptcy, real estate, personal damage and child custody. In cities with large ethnic populations, the ads feature immigration procedures. In state capitals, there is emphasis on workmen's compensation matters.

Though the advertisements surveyed lacked professional copy or layout, they still rated an "A" for creativity. In the Seattle directory, the advertisement of a lawyer specializing in immigration procedures is dramatized by an illustration of the Statue of Liberty (a 3,000 mile stretch of the imagination), and the headline "Yearning to Breathe Freely." The copy poignantly describes the glory of life in America and the complexities of gaining the right to live here without the services of the lawyer who placed the ad.

Philadelphia's Yellow Page lawyers are more direct: "Need a lawyer—at a price you can afford?" "Legal assistance priced especially for middle-income people like you." "The law is to work for you, and the lawyer to work for you is (name)." Although none of the statements are in conflict with the state bar association's code of professional responsibility, the possibility for crossing the line that separates the profession of law from the business of law looms directly ahead.

The problem lies in attitude. As one lawyer views it, "Law services constitute a product just like soap flakes or fried chicken. As a business person I have to develop expert ways to market my product. If advertising works for Ivory Snow and the Colonel, it can work for me."

If the proper advertising principles are applied, however, lawyer advertising can be successful, without resembling a fast food chain and degrading the profession. In fact, there are strong arguments that lawyer advertising benefits the public by offering a better understanding of legal services and opening the door to healthy price competition. In a recently published handbook entitled "Birth of a Salesman," a staff member of the Commission of Advertising cites one law firm's fee reduction for uncontested divorces from $350 in 1977 to a current $150 as a prime example of price-competition at work. In some cities, vigorous advertising led to price wars. At one point in Atlanta, the advertised cost of an uncontested divorce plummeted to $39.

What happens when the competition really becomes fierce? The potential market for legal business may be large, but so is the volume of practicing lawyers and new lawyers pouring out of law schools. It is estimated that the schools throughout the coun-

try are turning out 40,000 graduates each year. With more lawyers graduating than retiring, the pressure of competition could open the full arsenal of promotional artillery.

The vigorous promotion of routine legal procedures may further damage an already tarnished image. The "budget clinic" image, for instance, could become the visible standard of the profession and even the venerable practitioner could be tarred by the same promotional brush. Some concern regarding this possibility has been indicated by a few state bar associations. The Florida Bar Association, for example, warns in the Yellow Pages that lawyers who advertise are not necessarily better than non-advertising lawyers. Mississippi and Missouri, fearing the irrational appeal of television's dynamic promotion potential, forbid the use of both music and pictures in lawyer's television ads (only the printed message may appear on the screen).

Roger P. Brosnahan, chairman of the American Bar Association's Commission of Advertising, feels that the image of lawyers cannot be harmed further by the new wave of advertising. He cited a survey conducted by the commission that showed most people are intimidated by lawyers; that hiring a lawyer is often considered "like calling a priest to the bedside of a dying patient."

Books and films haven't helped. Lawyers are portrayed as unscrupulous ambulance chasers, political con men, mouthpieces for the gang and errand boys for ruthless executives. Their language is obscure; their procedures purposely complex; their fees ruinous.

The Good News and The Bad of Lawyer Advertising

Do lawyers who advertise benefit from the experience? Three examples appear to answer that question in the affirmative.

— A Wisconsin lawyer claims to have gained 5,000 new clients in the first year of placing television commercials featuring the slogan: "You can talk to a lawyer for just ten bucks."

— The information coordinator of a Chicago legal clinic that offers prepaid or fixed fee services estimated that up to ninety percent of the clinic's leads come from television spots. The sales pitch: "Are you overwhelmed by debts? Bankruptcy is a way to end harassment and start a new life."

— *Advertising Age* reported that when a young lawyer opened her Cincinnati clinic in 1978, she invested $500 for the production of a TV commercial. The TV promotion was so effective that she produced a second spot and added radio commercials to attract a specific market.

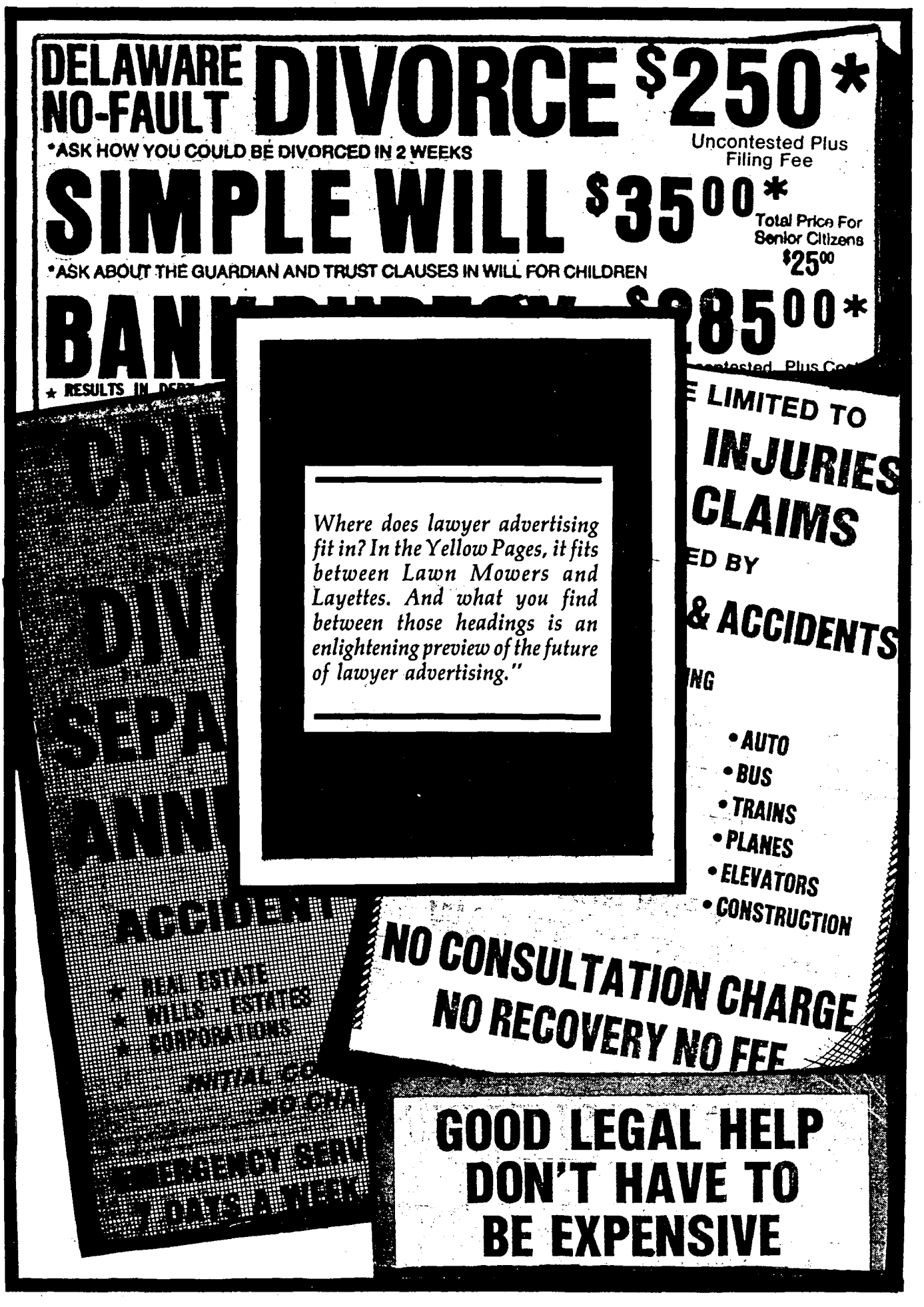
On the other hand, *Advertising Age* cites what may be a classic case history of a failure in lawyer advertising. "One Boston firm...closed after only a few months in operation. Some place the blame on a poorly planned $200,000 advertising campaign." Too often, a misguided campaign plunges ahead at any cost without clearly defining the target and without calculating reasonable results. Or, even worse, perhaps the campaign worked too well and the firm was unable to cope with the volume.

The potential market for legal business is enormous, particularly for low-cost, high-turnover procedures including simple wills, uncontested divorces, routine real estate transactions, and personal bankruptcies. While the market for these procedures may be limitless, low profit margins decrease their attractiveness to larger firms.

In spite of low profit margin, the market for these procedures helped spawn legal clinics. And it was the marketing of these procedures that generated momentum and set the tone for current lawyer advertising. The market was ready and willing because a true need existed, the procedures were available, the price was right, and the green light to advertise flipped on.

To keep the charges for these procedures at an affordable level and still turn an adequate profit, clinics created an infrastructure of specialists and paralegals reinforced by systems analysis and preprinted forms. And to produce the volume of clients necessary to support all of that, lawyers turned to advertising. Indeed, the more aggressive clinics

Yellow Pages advertisement casts King Kong in the role of terrorizing landlord to ignite the emotions of persecuted tenants. This witty attention-getter achieves its objective.


DELAWARE NO-FAULT DIVORCE $250*
*ASK HOW YOU COULD BE DIVORCED IN 2 WEEKS
Uncontested Plus Filing Fee
SIMPLE WILL $35.00*
Total Price For Senior Citizens $25.00
*ASK ABOUT THE GUARDIAN AND TRUST CLAUSES IN WILL FOR CHILDREN
BANK
$85.00*
★ RESULTS IN
Where does lawyer advertising fit in? In the Yellow Pages, it fits between Lawn Mowers and Layettes. And what you find between those headings is an enlightening preview of the future of lawyer advertising."
LIMITED TO
INJURIES
CLAIMS
ED BY
& ACCIDENTS
NG
• AUTO
• BUS
• TRAINS
• PLANES
• ELEVATORS
• CONSTRUCTION
CRI
DIV
SEPA
ANN
ACCIDEN
• REAL ESTATE
• WILLS - ESTATES
• CORPORATIONS
INITIAL CO
NO CHA
ERGENCY SERV
24 HRS A WEEK
NO CONSULTATION CHARGE
NO RECOVERY NO FEE
GOOD LEGAL HELP
DON'T HAVE TO
BE EXPENSIVE

promoted themselves into chain operations. Young lawyers formed partnerships for joint marketing efforts. Even established law firms took the first plunge into advertising.

To quell any possible fears of the uninitiated or wary clients, the first wave of advertising offered a free first consultation and a fee schedule of low cost services. The response was so encouraging that advertising investments and the number of advertisers blossomed. The offer of free consultations brought a deluge of telephone inquiries. But advertisers reported that out of every ten calls, seven or eight simply sought reassurance and never reappeared. With this loss leader cutting into time and profits, the free consultation rapidly evolved into a $10 or $20 initial charge.

The shopping list of low cost legal procedures also developed problems. Each case was different and required varying amounts of time. Unfortunately, lawyers were locked into their advertised fees—at least for the lifetime of the publication. More importantly, the value of specific procedures was established in the public mind.

Advertising, however, was still looked upon as the magic wand. Promotion budgets increased and advertising messages were professionally honed.

The Bottom Line

The amount of advertising dollars that could be invested staggers the imagination. Newspaper advertising space is sold by the *column line* and broadcast media by the *second*. A relatively small tombstone advertisement in the eastern edition of the Wall Street Journal can cost as much as $1,000.

What is the potential advertising dollar volume? Estimates put the number of practicing lawyers in the USA today as high as 500,000, or one lawyer for every 400 persons. Currently, only about seven percent of the lawyers are advertising. If the number of advertisers increases by just 3½ percent a year, over 100,000 lawyers will be buying public attention in practically every available medium by the mid-eighties.

If each of the 100,000 advertising lawyers averages a mere $2,500 for promotion in the year 1985, the public will be bombarded by a quarter billion dollars of promotional messages. An advertising expenditure of that magnitude would represent the eighth largest advertising budget in the U.S. today— surpassing such marketing giants as AT&T, Ford, Pepsi and MacDonald's.

Advertising Strategies

If the forces of over-zealous or injudicious advertising are threatening to add tarnish to an already maculated image, why not use the same weapons to turn the tide? There are scores of strategic options.

For example:

—*The Group Strategy*: A certain aura envelops groups that are intent upon achieving mutually beneficial objectives. There seems to be an enhancement of purpose; an involvement of goals.

An action program could be developed through a triad of the American Bar Association, state bar associations and the advertising lawyers. The purpose would be to pool forces and bring the most appropriate promotional resources into a working arrangement.

A parallel example of professional image changing and marketing efforts has been launched by the American Dental Association (ADA). The dental profession was faced with problems similar to the legal profession: underutilization of services; a leery and frightened public; and proliferation of promotion by dentists and clinics expounding low-rate, no-wait services.

In early 1980, the ADA undertook a two million dollar advertising program to educate the public about the advantages of oral health. The ADA, in conjunction with local dental societies in several test areas, is helping to promote better understanding of

Stuart and Lincoln, Attorneys and counselors at law. Will practice jointly in the courts of this judicial circuit. Office no. 4. Hoffman's Row. Upstairs. Springfield.

Advertising run by two young lawyers, John T. Stuart and Abraham Lincoln. Sangamo Journal, *Springfield, Illinois, August 1838.*

The prohibition of advertising by lawyers seems to have originated as a mere rule of etiquette and good taste in Great Britain. The premise was that the practice of law was a pure public service and that neither solicitors nor barristers were engaged in vulgar "trade." See *Bates v. State Bar of Arizona*, 433 U.S. 350 at 371-372 (1977). These refined sensibilities did not survive, for very long at any rate, the journey across the Atlantic. Certainly by the late 19th Century newspaper advertisements and enormous display signs were prevalent in urban and frontier areas alike, as the illustration of advertising by no less a lawyer than Abraham Lincoln demonstrates. Perhaps one should expect nothing different from the era of laissez-faire capitalism, social Darwinism and the Robber Barons.

Advertising by lawyers in the United States came to an abrupt halt shortly after 1908 with the promulgation of the American Bar Association's Canons of Ethics and their gradual adoption by the States. The original Canons contained an absolute ban on advertising to the public other than decorous office nameplates and listing in the telephone book (in tiny type) the lawyer's name, address and telephone number only. There matters stood until the Supreme Court's *Bates* decision in 1977.

The Editors

the relationships between general care and specialization, how to select a professional, and what to expect in treatment and cost.

The legal profession could achieve similar objectives by encouraging the coordination of promotion efforts. The results would be superior in presentation, concept and credibility.

—*The Professional Respect Strategy*: There are two groups of individuals who would be made aware of the importance of the legal profession—the general public and the lawyers themselves. To paraphrase the gag line of a contemporary comedian, the lawyer gets no respect.

What a pity when one considers the genesis of the legal system. The court of law was a social invention of the Sumerians in the year 2400 B.C. The law courts were a department of what was considered the divine government, directed by the gods' servants. There are few professions with a longer, more dedicated history.

For the professional respect strategy to be effective, a large-scale education program with an exquisitely designed theme should be launched to regain public confidence and to instill a new spirit of pride, dignity and professionalism into the straying members of the legal community.

If properly organized and conducted, this type of national education program would serve to reinforce individual local advertising efforts—not unlike the notably successful educational and promotional campaigns by Ma Bell and her local subsidiaries.

—*The Services Reclassification Strategy*: If the competitive advertising of routine legal procedures is threatening to disfigure the legal image, some soul searching may be necessary to reassess the position of these procedures on the legal/paralegal continuum. Shifting them closer to the paralegal end may help diminish their mystique and defuse the "loss leader" effect.

On the other hand, a reassessment may be academic if an aggressive and sophisticated public gains more confidence in the plethora of How-To books.[2] Or if such national chains as H. & R. Block and Sears feel it would be profitable to add those procedures to their merchandising programs.

The advantage of a national education program is the power to reshape the procedural system and assign new values to its parts in the collective mind. The advantage of local advertising is to delineate the responsibilities of the individual practitioners.

—*The Innovation Strategy*: Nothing quite snares the attention and fascination of the public as a well-promoted *new* service or product. And few things build greater loyalty and desire than a new service or product that meets the challenges of an ever-changing society.

It is the responsibility of the legal profession to invent services appropriate for a changing society. New services in turn represent new opportunities for increased work and revenues. For example, the fledgling field of pre-paid legal services—if properly developed and marketed—could offer a wealth of activity.

In addition, an adequately funded national institute of law could be established for funding groups of innovative lawyers (and capable individuals from other disciplines) to anticipate the legal needs of a highly diverse and complex society; to invent the legal technology for fulfilling those needs; and to develop effective and acceptable methods for informing the public.

If lawyer advertising is here to stay, it should be used as a positive force to create a greater and more beneficial understanding between the professionals and the public. It may take the combination of a marketing genius, communications expert and evangelist, but the cost and the effort would be well worthwhile. □

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[1]"Definition of Brooklyn Man Held Best," *Advertising Age*, July 28, 1932, p. 1.

[2]A sample of new titles: "How to Form Your Own Corporation Without a Lawyer;" "How to Handle Your Own Lawsuit;" "Everybody's Guide to Small Claims Court;" "Construction Law in Contractors' Language;" "Complete Practical Guide to Divorce Law;" "Legal Handbook for Small Business;" "How to Do a Bankruptcy;" "Do Your Own Estate Planning."

The father and son team of Edwin and Ze'ev Golin command a fine diversity of experience and interests. Ed is a marketing communications consultant who began his career as an experimental psychologist and university instructor.

His keen interest in human behavior led him to a career embracing a broad range of interpersonal information programs. His company, Gauge Corporation, has developed and applied marketing and communications programs for private agencies, educational institutions, and government agencies. Gauge became actively involved in DELAWARE LAWYER when it was nothing more than a fevered ambition of its founders.

Ed served as director of economic development for the State of Delaware from 1961 to 1965. He has organized and led official Delaware trade missions to western and eastern Europe, Latin America, and the Far East. Ed manages to find time for active and enthusiastic support of the arts and education. He is a member of the Board of Directors of both the Delaware Art Museum and the Delaware State Arts Council.

Ed's son, Ze'ev, a graduate of Franklin & Marshall College, has masters degrees from Temple University and the University of Pennsylvania. He originally worked as an account executive, writer, and researcher for Gauge, specializing in government, health, education, and politics. He is now an international trade specialist for Bank Leumi, Israel's largest bank. Ze'ev lives in Tel Aviv, where he also works as a correspondent and newspaper columnist.

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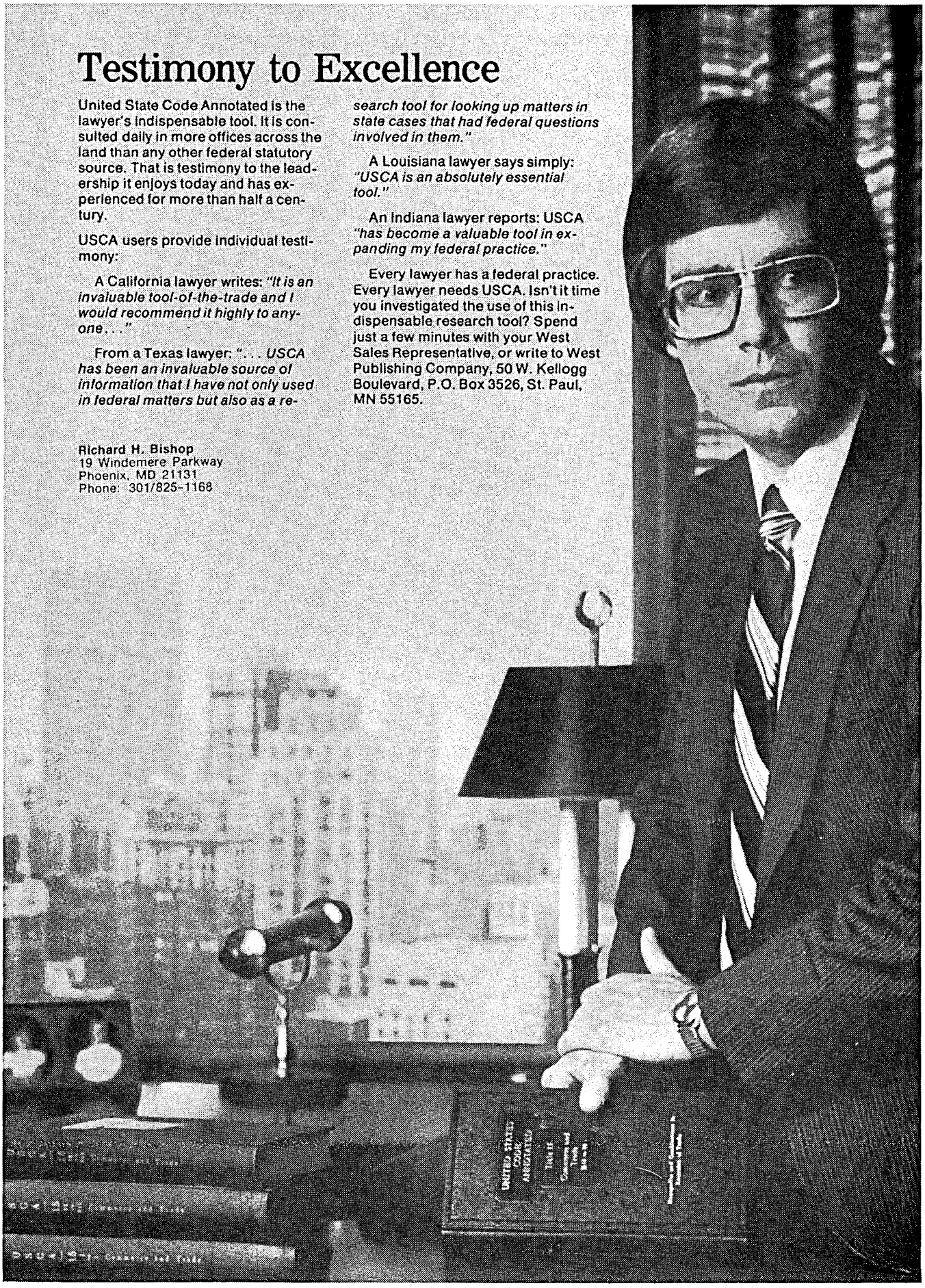

THE STATE OF THE LAW

Remarks to the Wilmington Rotary Club April 29, 1982

E. N. Carpenter, II

Thank you so much for those kind remarks. You have said so many convincing nice things about me that my father would have enjoyed hearing and my mother would have believed. However, I should warn you, as Judge Lord of Philadelphia did on an occasion here sometime ago, that the excesses of flattery rarely meet the expectations of conceit.

My remarks today relate to Law Day, traditionally May 1st of each year. Perhaps even more significant is the fact that this year is the 75th Anniversary of a famous speech by Dean Roscoe Pound of Harvard Law School, entitled, "The Causes of Popular Dissatisfaction with the Administration of Justice." Unfortunately, seventy-five years later we find much the same, and perhaps even an intensified, dissatisfaction. More distressing, we find that there exist many of the same causes. Lawyers and the courts continue to be in disrepute. I am told of the visitor to a cemetery in Massachusetts who, on seeing a gravestone inscribed with the phrase, "Here lies a lawyer and an honest man" exclaimed: "My God, they buried two people to a grave here!"

In our brief time together here today, I should like to comment not on the state of the nation, not on the state of the state, but on the state of the law in this nation and in Delaware in 1982.

I bring you good tidings and bad tidings. Good in the sense that great efforts are underway to improve the problem areas, and particularly good news for us in that Delaware continues to be outstanding in these efforts. But there is bad news in that the problems persist, and that much of the criticism is justified, and solutions elude our grasp.

Dissatisfaction with the overall administration of justice, and particularly with our courts has surfaced in many ways in recent years, and in recent months. A number of bills are now pending in Congress, particularly in controversial areas such as busing, school prayer, and abortion, designed to limit or eliminate the jurisdiction of certain federal courts in those areas. The judiciary, once regarded by Alexander Hamilton as "the least dangerous branch of our government," is now perceived as a power grabbing threat. These bills, as one study notes, "provide a device whereby each time a decision of the Supreme Court or a lower federal court offends a majority of both Houses of Congress, the jurisdiction of the federal courts to hear that issue will be stripped away." (ABA Report, ABA Washington Letter, Volume 18, No. 4, April 1, 1982). I do not think that is desirable, and I hope you do not, either.

Even our governor has been critical of the federal courts, noting that "it is the paradox of an unelected and unrepresentative institution asserting the power to set aside and nullify the choices of elected representatives of the people" (Du Pont speech, delivered to Delaware Law School moot court honor society, November 11, 1981). Governor du Pont continued by quoting Robert Bork: "We have never had a rigorous theory of judicial restraint; for a time we had a tradition; now that is almost gone." To that, let me respond that sometimes our political leaders seem to forget Cicero's famous maxim: "We are in bondage to the law in order that we may be free."

What are the reasons for the continual dissatisfaction with our courts? First, in order to put the problem in perspective, it is important for us to realize there are built into the court system a number of criticism-generating features. Courts deal in disputes, and they have undertaken an obligation to resolve those disputes. As a result, in litigation which is prosecuted to judgment, one side usually loses. It is human nature for the loser to blame that loss on everything other than his own performance or the merits of his case, and the court is the largest and most vulnerable and visible target. Further, it is in the nature of commentators to criticize when decisions are in controversial areas. As Hardy Dillard, a former judge of the World Court, commented, "A judge must find a solution to every difficulty. A law professor must find a difficulty with every solution."

Furthermore, in recent years courts have been compelled to deal with matters of passionate controversy because other branches of government have defaulted on their own obligations to confront and resolve problems. These include segregation, where the legislatures and school districts had not responded; re-districting, where state legislatures had refused to recognize population shifts; and corrections, where penal institutions had deteriorated shamefully with no remedial action by state governments. These were difficult problems. That's why other branches of government shied away from them. They were problems of high visibility and heated controversy, and they all ended up in the courts. Perhaps we should have expected that. If, because of demographic evolution, rural areas with a low population have excessive influence in state legislatures, how can it ever be expected that the legislature

dominated by that influence will vote to take power away from its own majority? Only a court can solve that problem. But such solutions necessarily make enemies.

Similarly, if Congressmen or state legislators themselves engage in excesses in violation of the Constitution, only a court can solve that problem. Yet partisans of one side or the other of such a hot dispute are bound to be disappointed, probably outraged, certainly critical.

Thus we have sent to the courts those disputes too hot to handle elsewhere, disputes of such importance or issues contested with such passionate intensity, that there is no other way to resolve them. Great questions of the guilt or innocence of the accused in criminal cases are resolved there. Rights to recover in civil cases where the evidence is less than clear, and the parties refuse to compromise, end up in the courts. Troublesome family or domestic disputes, arguments over zoning—all cases where much more heat than light is generated—must be resolved there. Is it any wonder that the courts generate controversy about themselves, since in every such dispute there must be a decision, and that decision is certain to antagonize one side or the other, sometimes both.

And so we have legislation in Congress designed to divest the federal courts of jurisdiction, and criticism by people who feel the courts have gone too far, or not far enough. But as Senator Schweicker so aptly stated: "The Congress has always had it in its power to end discrimination... the fact that we chose not to avail ourselves of the powers inherent in this body is what precipitated the matter of which [you] now complain; that is, that the courts did have the courage to address the issue which Congress has ducked."

It is in criminal justice that the courts are particularly visible and particularly criticized today. I do not need to tell you of the stupendous, frightening growth of crime in America, particularly violent crime. Violent crime grew by 13% in 1980 with a similar alarming increase in 1981. These are disturbing statistics for every one of us, and have already affected the lives of most of us. I suspect everyone in this room has felt this impact in some special way within the past five years either because you or a friend or a neighbor has been a victim of crime or because you have expended substantial sums of money on burglar alarms or because you have changed your life style and do not go abroad on the streets of New York or even of Wilmington late at night any more.

"Courts deal in disputes, and they have undertaken an obligation to resolve those disputes. It is human nature for the loser to blame that loss on everything other than his own performance or the merits of his case, and the court is the largest and most vulnerable and visible target."

And the courts have borne the brunt of the criticism for this situation. The courts are a part of the administration of criminal justice, and should share in the blame for a system which is not working. But what is the big picture? There are many parts of the criminal justice system. There are the police who are endeavouring, subject to budget limitations and new legal restraints, to meet the challenge. There are the courts and our laws, but it should be recognized that they have limited powers. The courts do not see the criminal until he has committed a crime and has been apprehended and charged. Unfortunately, crime does not decrease in any precise ratio as the administration of justice improves, or vice versa. But the courts do play an important role.

A third and important part of the administration of criminal justice is our corrections system. We have all read about Delaware's in the newspapers. It is almost trite now to say that the corrections system does not correct, and perhaps less trite but equally obvious to say that it is not working in even more fundamental respects, including providing habitable accommodations for our rapidly growing criminal population. The new attorney general of Pennsylvania, Roy Zimmerman, complained of a 14% increase in the Pennsylvania prison population, necessitating the construction of two additional 500 cell institutions. Are the citizens willing to pay for the additional funds required for such a major investment?

But let me turn to a fourth and perhaps most important segment of the criminal problem, and that is you, me, and all of us in this room. That is not because of our lack of concern. But that is because we as teachers, parents, homeowners, businessmen, professionals, create the climate in which crime flourishes or dies. If you brag to your children or in your club locker room of how you have cheated on your tax return, indeed, if you cheat on your tax return without bragging, perhaps without detection, you nourish the soil in which crime flourishes. If you and I are indifferent to the struggles of governmental officials to cope with this problem, if you complain about spending the money for the necessary police or the best type of judges or the adequate corrections facilities which are required, you and I contribute to that problem. Two thirds of all robberies and half of all assaults on youths 12 to 15 were committed in schools. Yet, that is where we are training our children! If we fail to provide our schools with the tools to stop this sort of outrage, we contribute to the problem.

E. N. Carpenter II, consummate trial lawyer, is well known to all of us in the profession. Ned is a former President of the Delaware Bar Association. He is Chairman of the Delaware Judicial Nominating Commission, a member of the House of Delegates of the American Bar Association, and President of the American Judicature Society. Ned also practices law with the Wilmington law firm of Richards, Layton & Finger and still somehow finds time to make speeches.

Even in the area of civil, that is non-criminal, litigation there have been criticisms, many of them justified, of our national court systems. Litigants never cease to complain about the delay in obtaining justice. First let me note that speed is not the most essential ingredient in judicial proceedings. A French philosopher once stated that "perfection in a clock does not consist in being fast, but in being on time." So perfection in a judicial system does not consist in speed, particularly does not consist in haste, but rather in the proper achievement of justice.

Let me turn now to the situation here in Delaware. I am glad to be able to report that the high reputation of our courts continues. In this state we have a judicial nominating commission which submits the names of a few of the most highly qualified available attorneys and judges for appointment when a vacancy occurs. Our present governor has committed himself not to go outside that list in making judicial appointments. As judges retire or otherwise leave office, our courts continue to replace them with men and women of ability and continue the fine tradition of a Delaware judiciary second to none.

As for court delay: the Delaware Supreme Court is now each month hearing oral argument, or accepting the submission of a case on briefs, in all cases which were at issue and awaiting submission as of the 15th day of the previous month. Since the expansion of the court from three to five justices three years ago, the Supreme Court has announced final decision and disposition of approximately 1,000 appeals.

Our Chief Justice has challenged comparison of that productivity with the annual disposition of the larger Supreme Court of California of about 200 appeals per year and the larger Supreme Court of Massachusetts of about 275 appeals per year. As of October 16, 1981, only five cases had been under submission in Delaware for more than 90 days.

Our Superior Court is trying criminal cases on the average within 70 days after arrest, well within its 120 day deadline. This is one of the very best records of accomplishment in the country.

Talleyrand once said that war is too important to be left to the generals. Similarly, law and the administration of justice are too important to be left to the lawyers. We need help.

All over the country, and here in Delaware, non-lawyers are becoming more and more involved in the administration of justice. Non-lawyers are serving on judicial nominating commissions, and they serve here in Delaware and make an important, indeed indispensable, contribution. Non-lawyers are serving on judicial discipline organizations, and they serve on our investigatory committees of our Court on the Judiciary here in Delaware. I hope that if any of you has an opportunity to serve on these important branches of our justice system, you will accept and provide the input essential to making these organizations work.

All segments of our society deserve and need an effective court system. Fred Friendly, former CBS News President and now the Edward R. Murrow Professor Emeritus at Columbia University's Graduate School of Journalism, commented earlier this year, for example: "I know of no nation on earth where there are weak and subservient courts and a free press." Similarly, without a strong and independent judiciary all areas of our society, economic, political, and social, are threatened.

For these reasons, I urge you to give the courts and the administration of justice the support they need. □

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THOMAS SPRY
THE FIRST DELAWARE LAWYER

William Prickett

Delaware lawyers frequently show out-of-town counsel the handsome bronze plaques that adorn the hallway outside the Courtroom of the Supreme Court of Delaware in Dover. The plaques list, in chronological order, the names of all who have been admitted to practice before the Courts of Delaware since 1676. Each year, the names of those newly admitted to practice are added. It is sometimes said, surely in jest, that the U.S. Senate is the most select club in the world. By my calculations, there have been fewer persons admitted to the Delaware Bar than have been admitted to the U.S. Senate. Perhaps the Delaware Bar has been more selective than the Senate.

The assembling of the names of all who had ever been admitted to practice in the various Courts of Delaware was done at the direction of the late Chief Justice Wolcott. Someone originally suggested that the plaques commence with the year 1930, the year in which the Supreme Court of Delaware, rather than the lower Courts, began admitting attorneys to practice. Chief Justice Wolcott decided the list should begin with the first Delaware attorney. He said with an enigmatic and characteristic smile that if the list did not commence with the first lawyer admitted in Delaware, the list would not include Dr. Thomas Spry. This, the Chief Justice said with a twinkle, would be a great loss.

The work of trying to assemble the names of all who had been admitted as attorneys in the law Courts or as solicitors in the Courts of equity of the three Counties proved to be quite a task. Inevitably, an ugly question arose: should those once admitted but subsequently disbarred have their names emblazoned on the plaques? It was ultimately put to the Chief Justice for his decision. Again, he referred to Dr. Thomas Spry, saying that if subsequent disbarment were the test, it could just possibly result in the elimination of our legal ancestor. And so, the elegant plaques list even those Delaware attorneys whose misdeeds have led to disgrace and disbarment. Thus, Dr. Spry's name appears (and will indeed appear for all time) as the first of that most select company — the Delaware Bar.

What did Chief Justice Wolcott know about Delaware's first lawyer?

In these days, Americans are spending a lot of time and effort delving into their "roots". It is not unnatural therefore that members of the Delaware Bar are interested in learning what manner of lawyer the "Adam" of the Delaware Bar was. When I asked Chief Justice Wolcott about Dr. Thomas Spry, he simply handed me a small volume entitled "Thomas Spry — Lawyer and Physician" by John Frederick Lewis, A.M., LL.D. of the Philadelphia Bar, published in 1932 by Patterson & White Company of Philadelphia, Pennsylvania. The Chief Justice's quiet amusement at the mention of Spry's name should have put me on my guard. However, as I sat down to savor this ancestral account, I had a mental image of Dr. Spry — a dignified colonial scholar, embodying the legal talents of Lord Coke, the practical wisdom of Ben Franklin, and the moral rectitude of George Washington. Alas, the truth so often differs from our hopeful preconceptions.

On first reading Mr. Lewis's badly written little history, I thought that his unflattering portrait of Dr. Thomas Spry was just another vilification of a Delaware colleague by a Philadelphia attorney. Although Mr. Lewis's book frequently digresses into a rambling hodge-podge of colonial curiosities such as the ecclesiastic laws, ear-markings of hogs, proof of the killing of "woolves" by the recording of their tongues, and public whippings of the mothers of bastards, when Lewis finally got down to writing about Spry, he took his facts straight from Delaware Court and other colonial records, and his account cannot now be disputed.

In case any other member of the Delaware Bar is unjustifiably basking in the pride of his legal ancestry, let me, in the privacy of this journal, disabuse him. Thomas Spry turns out not to be a legal demigod or giant from the dawn of Delaware's legal history. The picture that emerges from the early records as set out in Mr. Lewis's book is the homely portrait of an English emigrant who, apparently both to augment a paltry income and to indulge a litigious nature, got himself admitted to practice in New Castle in 1676. Thereafter, Dr. Spry frequently appears in the Court records, not only as an attorney for his English and Dutch

neighbors but surprisingly often as a plaintiff or a defendant. The following is a brief distillation of Mr. Lewis's prolix little book.

Colonial Court and other records do contain some personal facts about Thomas Spry. While the precise date and place of his birth is not known, he came from a venerable English family in Devon, and was apparently born there in about 1626. By the year 1670, he had emigrated from England to New Amsterdam (as New York was then known), though a Sarah Spry, presumably his daughter by a first marriage, is mentioned in his Will of 1685 as living in "Plimouth" (England). Some time in 1674, he witnessed the Will of his friend, Barent Egbert, in New Amsterdam. Two years later, he and Egbert moved from New Amsterdam to New Castle, Delaware. He appears to have practiced as a medical doctor in New York before coming to Delaware: Thomas Spry "Chirugeon" received a confirmation from Sir Edmund Andros for a parcel of land entitled "Doctors Commons" on the South side of St. George's Creek in New Castle County, Delaware, on November 5, 1675. He continued to practice medicine from the time of his arrival in New Castle until his death: indeed, even after he was admitted as a lawyer, the Court records show that he, not unlike medical practitioners today, made more money "doctoring" his neighbors than he did lawyering for and against them. In addition, the records indicate that, like many of his neighbors, he did some farming and trading on the side, and acted at times as an accountant. As noted, he witnessed the Will of his friend, Barent Egbert, while still in New Amsterdam. After his arrival in New Castle, he proved Egbert's Will. Then, as Mr. Lewis sarcastically notes, he "proved" Egbert's widow, Rebecca, by marrying her. Rebecca Spry thereafter appears in Court records occasionally as a witness or midwife. Dr. Spry's straitened economic circumstances are confirmed in the Court records in a not uncommon and not very handsome manner: he and Rebecca bound out Egbert's daughters, Henrietta and Anna, during their minority to neighboring farmers.

He must have been a rather difficult neighbor. On February 3, 1679, the following notation was entered in Record of the Court of New Castle, (Liber B, 164): "'Complaint being made in Court ag': doctor Tho. Spry; that hee Keeps a daingerous hurtful dogh; for man & beasts Its ordered & doctor Spry was by ye Cort: forwarned, not to Keepe ye s^{d}: dogh any Longer, otherwayes; whatsoever mischiefe ye s^{d}: dogh shall happen to doe hee to make good, & the dogh to be Imediatly Kild.'"

The first business of the Court on November 7, 1676, at New Castle was the admission of Thomas Spry: "Uppon the Petition of Thomas Spry desiering that hee might bee admitted to plead some Peoples Cases in Court etc: — The Worpp Court have Granted him License so Long as the Petitioner Behaves himself well and Carrys himselfe answerable thereunto." (Records of the Court of New Castle, Liber A, p. 9).

At the next session, for some unexplained reason, Thomas Spry had himself readmitted and resworn: "Thomas Spry uppon his Request was admitted & Sworne an attorney for this Court of New Castle." (Record of New Castle, Liber A, p. 96).

Shortly thereafter, the Court records show that the Governor and Council at Fort James on May 19, 1677, "Resolved and ordered that pleading attorneys bee no longer allowed to practice in ye Government but for ye depending Causes." (Liber A, pg. 133). There is nothing in the records to show, up to that point at least, that anything that Dr. Spry had done led to this blanket disbarment of the entire legal profession which, incidentally, consisted only of Dr. Spry. (Presumably it was this general disbarment order that Chief Justice Wolcott had in mind when he decided that disbarment should not work attainder so far as the plaques were concerned.) The Order of May 19, 1677, is quite similar to orders and rules entered in other colonies prohibiting the practice of law. In spite of the foregoing order, the Court records show that Dr. Spry (and later others) continued to practice as attorneys in the succeeding four years covered by the early Court records (Liber A and B). Fortunately for all of us, Dr. Spry and his colleagues were adroit enough somehow to circumvent the order that might have stifled our profession at its very birth. But for that, there might never have been the elegant plaques nor indeed the select club, the Delaware Bar.

One might well wonder how Dr. Spry could practice when he was the only attorney admitted in New Castle. The answer is that colonial litigants usually acted as their own attorneys, and laymen frequently represented litigants as attorneys-in-fact. The Court record shows that in his first year of practice, Spry was plaintiff in six cases and defendant in an equal number. Spry's straitened circumstances surface on December 5, 1676, only one month after he was admitted. John Adam sued him for 45 gilders or about $20. Mr. Lewis observes: "Execution was issued but the record states that the defendant acknowledged the debt and 'desiered butt twelve dayes respitt for payment', and the Court ordered judgment to be entered for the plaintiff and no execution was to be issued until after twelve days had expired. (Ibid, Liber A., pg. 30)."

He was forever suing someone or getting sued. Two days after being admitted to the Bar, Dr. Spry brought suit on his own behalf against one Otto Wollgast. On December 5, 1676, the case was tried: "'The

William Prickett, like his father, whose brief biography appeared in our first issue, combines professional excellence in the law with that wide range of cultural interests typical of the highly civilized Bar that conducts the practice of law in Delaware. Bill is the senior partner of the Wilmington law firm of Prickett, Jones, Elliott, Kristol & Schnee. He is a former President of the Delaware Bar Association. His success in achieving the renovation of that Victorian achitectural gem, the Wilmington Grand Opera House, has been widely applauded. His extensive writing includes fiction, travel literature, and, to our good fortune, the historical study here.

Pit: declares that this deft: haveing married the widdow of Michill Grace and as his Successor, is Indebted unto him as pr: acct: the Sume of 65 gilders for weh: hee Craves Judgemt: wth Costs.' (Ibid. p. 28). "The Court entered judgment against the defendant by default."

Mr. Lewis again: "Marrying a widow seems to have had drawbacks at that time. The second husband assumed the burden of the widow, her debts, and the debts of the late departed."

He goes on to say: "The old English Law made the widow responsible for her husband's debts to the extent only of the value of the goods and chattels she inherited from him, or the clothing she actually had upon her person at the time of her second marriage. Hence arose a custom — probably more honored in the breach than the observance — for widows to marry in their shifts. The widow sometimes went from her former house to that of her second husband in her chemise. Number 2 met her half way, and threw his cloak around her." Dr. Spry, in suing Wollgast, presumably knew what he was doing. He had married Rebecca, the widow of his friend, Egbert. The Court records and Mr. Lewis do not state whether Dr. Spry married Rebecca in her chemise to avoid any debts Egbert might have had but, as noted, he and the widow bound the Egbert girls out.

During the five years covered by the New Castle Court record in Libers A and B, Thomas Spry appeared before the Court as the party plaintiff thirty times and the party defendant fourteen times. It should be mentioned, however, that quite often a litigant assigned a cause of action to Spry, who would then appear not as attorney but as plaintiff. Not only did Dr. Spry deal in causes of action but, at times, he went bail for a client, also contrary to presently accepted good practice.

The records disclose that, in representing clients and himself, Dr. Spry not infrequently obtained continuances. On April 3, 1677, Dr. Spry represented the defendant in *Caspares Herman vs. Ralph Hutchinson*. According to the record, Dr. Spry stated: "hee cannot at prsent make any defence for want of his papers wch: by order of the Last Court hee was to bring in this Court," (Liber B, pg. 76). Mr. Lewis says: "but the Court entered judgment for the plaintiff, upon condition, that if Spry would bring his papers into the next Court, the execution would be stayed until then, but the record shows that execution was taken out, 3 October 1677, so Spry did not, and probably could not, produce his papers. (Ibid, Liber B, pg. 76.)

Regrettably this recitation, to be reasonably complete and truthful, must include the fall from grace that the records painfully detail: "Att a Court Caled by the Request of Capt: John Colier In New Castle July ye: 12th Ao: 1677;

Prsent

Mr. John Moll)
Mr. William Tom) Justices
Mr. Jean Paull Jacquet)

"Captn: John Colier Complaynes & Sayes that Doctor: Thom: Spry on the 9th: of this Instant month of July in a most Shameful & unhandsome way, (wth:out any Case), hath abused him ye: said Colier, wth: dirty and uncivill Languadge; presuming further to strike him the Sd: Colier, wth: a Caine uppon the head etc; The Sd: Captn Colier Leaueing the matter to the Cort to Inflict Sutch punishment uppon the Sd: Spry for his Sd: offence as the Cort: Shall Judge fitt;

"Thomas Spry makeing answer Sayes not to Remember That hee hath Committed the abovesd: offence; by reason that hee was verry mutch overcome wth: drinke, desiers forgivenesse for what hee hath done amis.

"Mr: Johannes d'haes Sworne in Cort: declares that on ye: 9th: of this Instant month of July The deponant was uppon his Cart by his doore and did see Doctor: Spry stand before Captn: Coliers house, and that Captn: Colier came out of his doore, and Spoke twoo or three tymes to Doctor Spry bidding him to bee gon, and the deponant stooping downe, when hee Looked up againe did see doctor: Spry and Captn: Colier striking one the other with: their Caines or stikes and after Severall Blowes on both sides Doctor: Spry broke his Caine upon the head of ye: sd: Capt: Colier, uppon wch: Captn: Colier Closed in and Colloring the Sd: Spry threw him to the Ground — Commanding Brantie to bring the Sd: Spry to prizon;

"Moses d'Gan Sworne declares the Same In substance, as is declared here above by Johannes d'haes;

"Whereuppon*****The humble peticon: of the sd: Spry to Cptn: Colier being Read; The Cort: In Regard of the humble Submission of the Sd: Spry (although the Merrit of the fact deserved a more Severer punishment) doe order the sd: Spry publicqly In Court to Craue pardon and Aske forgivenesse of the sd: Captn: Colier for his sd: offence, And doe Condemne the sd: Spry In a fyne of twoo hundred Gilders, to bee paid to Captn: Coliers order, Together with Costs;

"Thomas Spry in open Cort: asked forgivenesse of Captn: Colier for his sd: offence Committed, According to the abovesd; order Captn: John Colier did thenke the Court for what they had done; and did in open Court Give the abovesd: 200 Gilders Fyne To Amilius de Ring, The Reader of the t' Church."

Dr. Spry was not the last Delaware doctor brought low by strong drink. At least, he had the wit, grace and humility to ask forgiveness in open Court. When all is said and done, the whole affair redounded to the distinct benefit of the little community — the stiff fine was used to support a functionary of the church.

In 1680, Dr. Spry executed a deed poll conveying his property known as the Doctors Commons to Jacob Young. Since Rebecca did not join in this conveyance, it seems likely that she had died by that time. Dr. Spry's Will, proved December 7, 1685, is the last colonial record of him. It makes no mention of Rebecca. Whatever his failings and frailties, his Will seems to show contrition and an awareness of the imminence of death: "In the name of God Amen I Thomas Spry being Sick & weake in body but of perfect memory Gods name be praised and calling to remembrance yt all men must certainely dye doe make my last will and testa-

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BIRTH OF BANKING
David C. McBride
(Continued from Page 38)

ment that would be spurred by banks coming to Delaware, and Frank Biondi explained the legal structure of the proposed legislation. After the presentation, the entire Delaware Bankers' Association supported the legislation. Governor duPont was then able to go back to Chase Manhattan and advise them with some confidence that the legislation as drafted could be enacted.

The restrictions on the new FCDA banks were patterned after those adopted in South Dakota. There was a concern that the Federal Reserve Board, which must approve acquisitions by bank holding companies, might balk at approving acquisitions of FCDA banks if the restrictions on those banks varied from those imposed on banks acquired in South Dakota with the Federal Reserve's approval. Many of the ideas for liberalizing the terms of credit came from Joe Moran at Wilmington Trust. However, the elimination of the interest rate ceiling was not a primary objective of the local banks. They were essentially satisfied with the pre-existing floating rate in Delaware which had been only recently enacted. Also, at that stage, the proposed legislation contained no tax incentives, because Chase had sought no such incentives. However, as the Bank Task Force attempted to attract other banks to Delaware with the proposed legislation, tax incentives became a lure.

In August and September, after the Task Force became convinced that the proposal could be enacted, it began approaching other banks about the attraction of Delaware and the coming Financial Center Development Act. Mayor McLaughlin wrote to all the major New York banks inviting them to visit Wilmington and study the proposed legislation. Officials from a number of out-of-state banks were brought to Wilmington for special presentations. They would begin with visits to Irv Shapiro or Alex Giacco, followed by tours of Wilmington and the surrounding area, reviews of the proposed legislation, and would conclude with a dinner sometimes given by the Governor, Shapiro, or Giacco at such locations as Winterthur, the Wilmington Country Club, and the Hotel DuPont. All of this took place without *any* newspaper publicity.

One of the institutions so courted was J. P. Morgan & Co., parent of Morgan Guaranty Trust Company. Unlike Chase, Morgan was not interested in a credit card operation, and the liberalization of the credit terms, as contained in the proposed legislation, was not a significant enticement. Morgan wanted relief from New York taxes, and it became apparent that Delaware was willing to provide it. In late October, Glenn Kenton, Dave Swayze, Frank Biondi and Johannes Krahmer went to New York, in the words of one participant, to "negotiate" the tax provisions with Morgan. They developed the regressive rate structure contained in the Act. By reducing only the tax rate on "net income" in excess of $20 million, the duPont Administration avoided any revenue loss from existing Delaware banks, none of which has net income of that magnitude. At the same time, the progressively lower rate was designed to attract larger operations to Delaware and reward their profitability.

In addition to changing the tax rate, the Act redefined "net income" to exclude income earned by non-United States branches of a Delaware bank outside of the United States. Coupled with the provision of the Act permitting Delaware chartered banks to branch outside of the United States, the Act sought to ready international banking operations headquartered in Delaware.

According to a study done by Peat, Marwick, Mitchell & Co., the Delaware tax rate, together with the redefinition of income, makes the Delaware bank taxes appreciably lower in most instances than those in other major banking centers.

By the end of 1980, the Administration was counting on both Chase and Morgan to locate in Delaware if the proposed legislation was enacted. The adoption of the legislation was then the last step to be taken. In January, the Governor conducted a breakfast meeting attended by House and Senate leadership and members of the House Revenue and Finance Committee and Senate Banking Committee. A briefing on the proposed Financial Center Development Act was presented by the Governor, together with Hayward, Shapiro, Giacco and Biondi. When

the legislation was introduced in the House the next day, a majority of the members of the House and Senate acted as sponsors.

The following week the House Revenue and Finance Committee held a hearing on the bill in the House Legislative Chambers. It was a well-attended session. Shapiro, Hayward, New Castle County Executive Rick Collins and Joseph Moran from Wilmington Trust Company, among others, spoke in favor of the bill. The only Delawarean who raised his voice in objection to the bill was Douglas Shachtman, a Delaware attorney previously with the Community Legal Aid Society.

Following the hearing in Legislative Chambers, the Revenue and Finance Committee reconvened in its second floor offices. Attended by many of the same participants at the public meeting, the Act was amended in a number of respects, some of which eliminated concerns expressed by Shachtman. One member of the duPont Administration now confides that Shachtman probably caused more problems than he realized.

But notwithstanding Shachtman's problems, the next day the amended bill was reported out of Committee and adopted by the full House with a vote of 33 in favor and 3 against.

The following week the House bill as approved was submitted to the Senate. In early February, after an eight hour session and testimony in support of the bill by Biondi, Hayward, Moran and Shea, and testimony in opposition by Shachtman and John Boyle, the Director of the National Consumer Federation of America, the Senate passed the bill without further amendment by a vote of 14 in favor and 7 against. During the eight hour session, some 18 amendments were proposed to the bill. None was adopted.

The favorable action by the General Assembly met two of the political objectives of the bill's proponents. It proved that the General Assembly could act quickly in response to the needs of the banks, a reassuring trait if future needs arose. Also, the proponents of the bill avoided entangling the legislation in the type of horse trading that predominates during a regular session. To those more accustomed to legislatures unable to act decisively and beset by a variety of special interest demands, the conduct of the Delaware General Assembly was instructive and encouraging. The Delaware bankers, unlike the bankers in some other states, had abandoned a limited and parochial vision of self-interest for a broader vision of the community's interest, in which they shared to a significant degree. Wilmington Trust Company, initially cool to the idea, has trumpeted the Financial Center Development Act and events since its enactment in an edition of *Dateline Delaware*, a commentary on the economy of Delaware which it publishes. According to Shapiro and Biondi, the response of out-of-state banks to the Act has fulfilled their most optimistic expectations. Both hope that it will serve as a catalyst to stimulate jobs in other areas, and by enhancing Delaware's business image, will spur greater economic development for the state. □

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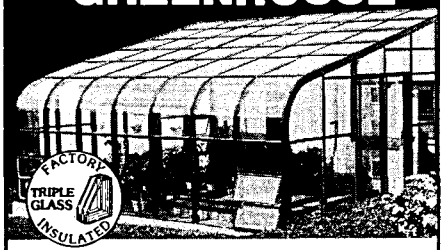

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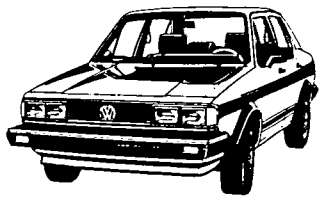

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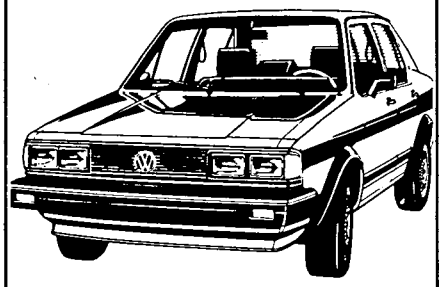

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20 MONTHS LATER

David B. Ripsom

(Continued from Page 33)

said by most in the public sector that actual response has far exceeded expectations.

The impact on Delaware can be measured in various ways. The FCDA banks already employ more than 1,000 people in full time positions. It is expected that 3,000 will be employed full time by 1984, and many people in the banking and public sectors are privately talking of possibly much higher numbers. By comparison, there are less than a dozen single private companies in the States each of which employs more than 2,000 people.

In addition, there is substantial additional spin-off employment which results from the newly created banking jobs. For example, Peat, Marwick & Mitchell, the national accounting firm, has recently opened a Delaware office, in large part to better serve the banking community. The Delaware Economic Development Office estimates that approximately 110 spin-off jobs in the service, real estate, professional, and related areas are created by every 100 new jobs in Delaware. That results in an estimated 6,300 new jobs in the aggregate created by FCDA by 1984. That figure may conservatively fail to reflect more FCDA banks commencing Delaware operations and substantially expanded operations of the first eleven banks as portrayed in their initial applications and planning.

While there is no requirement in the FCDA that the minimum number of 100 employees be hired from within the State, that has proven to be the situation to a very great extent, as expected. Generally only senior management of the new Delaware banks have come from the parent organizations. The Delaware living environment and banking opportunities have attracted more members of senior management from parent organizations than are needed in the new FCDA banks.

The State's treasury will also benefit from the new banks, although the operations of the FCDA banks have barely begun to produce the net income on which the bank franchise tax is paid. Nevertheless, it appears that the bank franchise tax payable to the State for calendar year 1982 will be approximately 1.3 million dollars higher than in 1981, most of it from the FCDA banks.

The Delaware State Chamber of Commerce has its own analysis of the impact of newly created jobs in the State. They suggest that every 100 new jobs will do the following:

- create 110 spin-off jobs,
- produce $7,400,000 more personal income a year,
- add $1,900,000 bank deposits a year,
- create the need for one more retail establishment,
- generate $800,000 more state and local taxes each year,
- require 16 new houses to be built, and
- increase retail sales by $4,300,000 a year.

It is estimated that each additional banking employee requires an average of 250 square feet of office space. Real estate market activity is measured in square feet of new lease space. In January, 1981, one real estate market maker projected 165,000 square feet of leasing activity in Wilmington; the actual figure for 1981 was 265,000. The passage of the FCDA and the influx of new banks into Delaware apparently account for at least 40% of that unforeseen activity. Twenty-two percent of 1981 growth in suburban leasing activity has been attributed to the entry of the new banks. One early forecast for 1982 was for 300,000 to 325,000 square feet of new leasing activity in Wilmington with another 225,000 to 250,000 feet in the suburbs. The actual 1982 numbers are now substantially higher. It is estimated that between ¼ and ½ of each total could be attributable to space leased by the new banks. Obviously, the FCDA is the major reason for new leasing activity.

The banks have taken advantage of vacant space and new construction. Chase has gone into the vacated Delmarva/Family Court building and Maryland Bank occupies what was a closed A&P. Morgan Bank will move into the old Hercules quarters. Provident and Philadelphia National banks are moving into new buildings constructed on speculation. Citibank Delaware is moving into a new data processing center at the Wilmington Airport and holds an option on nearly four square blocks in the center of the Financial Center area in downtown Wilmington.

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The occupancy of commercial office space is over 99% of capacity in Wilmington (excluding Du Pont) and more than 96% in the suburbs. These figures are all-time highs. Plans for 2 million new feet of office space have been announced. Some of it is already under construction.

One other indirect result of the FCDA is the Girard acquisition of Farmers Bank. While Girard might have bid (and won) on Farmers even without the FCDA, it is generally acknowledged that the bidding interest of all of Farmers' out-of-state suitors (4 of them) was whetted to the point of price premiums by the availability of FCDA provisions without need to comply with the capital, employment, and Delaware competition restrictions. The Girard acquisition has led to increased banking competition within the State, to the public's advantage. This may even be accelerated by Mellon's acquisition of Girard and thus Girard Bank Delaware.

The Bankers' Views

The new bankers in Delaware are enthusiastic. They seemed pleased with the regulatory structure Delaware has created, as well as Delaware's location and work force. Fred Lafferty is Executive Vice President of Equitable Bank of Delaware which commenced operations in Dover in June. He praises the cooperation from the State Economic Development Office and the Bank Commissioner as "fantastic" and notes that "the Delaware labor force is eager to learn and progressing nicely."

Manufacturers Hanover has not yet begun its operations in Delaware, but its new President, Mike Cassell, can hardly wait. Making an analogy to Delaware's success in the corporate arena, he says that: "If past is prologue, Delaware may be a better state than many other jurisdictions [in which to do a substantial banking business]." He notes that historically banks have been reluctant to change locations where a fixed dollar investment is involved and they have accordingly made location decisions after detailed consideration of many factors. While recognizing the obvious attractiveness of Delaware's new bank tax provisions and its freedom from usury restrictions, he says that market considerations were just as important in Manufacturers' decision to come to Delaware. Citibank Delaware President Earl Glazier agrees. "While the apparent opportunities and advantages of banking in Delaware were great enough to attract the FCDA banks, it is likely that they will multiply as the operations of the banks develop and Delaware itself grows as a financial center."

Only a short discussion with nearly any of the new bankers in Delaware shows that each of them looked hard at these advantages. The New York banks expected that the Delaware labor force would be an attractive one for banking operations. However, even they may be surprised. One New York bank is said to have concluded that productivity from the local operations is approximately 18 percent higher than in New York.

Citibank Delaware's Barry Keane, its Chief Operating Officer, stresses another advantage: "The New York Federal Reserve Bank handles a massive number of checks and banking transactions from many users daily. A great number of banks use that facility. The time element in such processing changes with the fewer transactions processed through the Philadelphia Reserve Bank." Time has become increasingly important in banking. Many of the new banking technologies and products are designed to maximize this to the benefit of both bank and customer. Speed in Delaware banking may be of special importance to FCDA banks, at least to those who didn't enjoy it before.

Local bankers also appear excited about what the FCDA has done for them. Jack Porter, President of Delaware Trust, says the Act "has definitely been a plus to Delaware banks. We have enjoyed a good relationship with the new banks and their staffs. We don't feel there has been encroachment on the business of the Delaware banks." The benefits to the Delaware banks flow from the need of the FCDA banks for various commercial banking services of local banks, the opportunity to work with the professional staffs of the new banks, and the general benefit of an enhanced local economy.

The State Bank Commissioner and the FCDA

Jack Malarkey modestly describes his last 18 months as "very hectic." His staff has already been increased and he needs more. Sometimes he goes from one hearing to another. Yet his office has not been called upon to undertake a bank examination of an FCDA bank. Once these banks have been in operation for a bit longer, that process will begin, and the demands on his office will be even greater.

Such banking examinations are conducted jointly with the federal banking agency, if any, which shares jurisdiction over the state bank being examined. No Delaware bank has been a member of the Federal Reserve System since 1972 when both Bank of Delaware and Wilmington Trust Company dropped their membership. Several of the new banks are members of the "Fed". State examination of those banks will be conducted jointly with the Philadelphia Federal Reserve Bank and not with the Philadelphia office of the FDIC (which usually examines Delaware banks).

Commissioner Malarkey says that his most important function remains assuring the safety and soundness of the banking institutions under his jurisdiction. When questioned about consumer concerns over Delaware's new credit statutes, his response is clear:

"With perhaps the possible exception of one bank, I don't believe any bank in Delaware is charging over 20 percent. Instead, they have used the Delaware statute as it was intended, by being innovative in their products and responsive to the marketplace. This new competition has helped the public. Credit is like anything else. The purchaser has to learn to shop for it."

Some Practical Aspects of the FCDA

A new statute normally involves new questions and unfamiliar procedures. The FCDA is no exception, beginning with the not infrequent difficulty of catching up with Secretary of State Glenn Kenton for his signature on new bank charters. The provision of the FCDA requiring him to sign manually each new charter has led to frenzied signing in automobiles and airplanes. More substantive questions have arisen, but so far these also have been resolved to the satisfaction of the interested parties.

One requirement of the FCDA is that the new bank may operate only a single office open to the public for banking in Delaware. While this requirement was not a sensitive issue for most of the FCDA banks, it required close analysis in the case of one applicant. This bank was committed to maintaining an office presence in the downtown area. Since there wasn't enough downtown space available, actual operations had to be located outside the city. The matter was resolved by confining the downtown office to executive offices, and banking operations to the suburban office, the only location open to the public for banking, as commanded by the statute.

Another requirement of the Act is that the bank must have at least $10 million in capital stock and paid in surplus at its inception and $25 million within one year after it commences business. One FCDA bank met this standard by funding its capital from an already existing out-of-state bank, in turn requiring the approval by the banking regulator from the state with jurisdiction over the other bank.

The employee requirement has also required interpretation. The one hundred employees must be full-time employees or their part-time equivalents. The employees need not be residents of the State; they must only be on the bank's payroll. The employees need not be hired locally. They may come from the out-of-state parent organization. Obviously the three-fold purpose of the employee requirement is to provide additional employment opportunities for Delaware residents, to increase tax revenues from new bank

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One of the most important requirements of the new statute is that the new bank may not be operated in a manner or in a location which attracts customers of the general public to the substantial detriment of domestic Delaware banks. This restriction does not apply to past or present customers of the FCDA banks, its holding company or subsidiaries of the holding company. Some of the FCDA banks, however, already have a very strong local presence because they exist across a nearby state line and have been doing business as a practical matter in Delaware for many years. It appears, nonetheless, that there has been material compliance with both the spirit and letter of this requirement. Commissioner Malarkey has received several inquiries about FCDA banks violating the restrictions on intra-state competition. "I have concluded after investigation that each concern has been groundless and based only upon rumor."

Various questions have required consideration. For example, the FCDA banks are empowered to have signs identifying their location, but the general guideline is that they should not naturally attract local banking customers. This has led to signs on the side or front of a building but not to large upright signs in shopping centers or similar locations, particularly where they would be close to domestic banks. It is likely that in the near future the State Bank Commissioner will clarify the advertising issue (signs included) by regulation.

Mail communication is a touchy topic. At least one FCDA bank says that its computers are programmed to avoid mail solicitations to persons with Delaware zip codes. This operating restriction would undoubtedly be important to the Delaware domestic bankers because that FCDA bank is reported to be undertaking a direct mail and telephone nationwide campaign to 700,000 professionals soliciting loan applications for up to $15,000 to fund Keogh plans and is mailing Visa credit card applications both to merchants and to students who already have student loans.

One particularly delicate point involves the federal Community Reinvestment Act, which is administered by different federal regulatory agencies. Depending upon the regulatory status of the bank involved, it can be the FDIC, the Federal Reserve Board, or the Comptroller of the Currency. The principal purpose of the statute is to ensure that banks make sufficient credit available to all constituencies in a bank's geographic market. Each bank is required to adopt a CRA statement describing its plans to satisfy the statute's objective. These are subject to review and approval by the regulatory agency. In Delaware, compliance with the CRA by the FCDA banks is complicated by the requirement that an FCDA bank not operate in a manner to attract customers of the general public but at the same time make credit resources available to the local community. The actual relationship of these federal and state provisions

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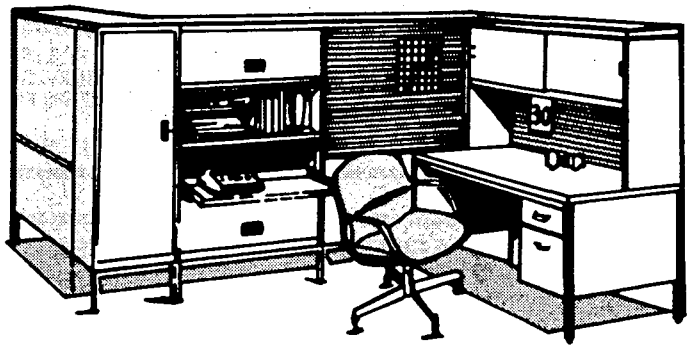

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is in the process of being defined. One FCDA bank seeking to comply with the Delaware restriction has placed its credit people on the floor below street level at which customers of the bank enter the building. This is designed to avoid any claim that the presence on the street level floor of retail credit officers could attract the general public. Perhaps the most common method of meeting the CRA requirement will be for FCDA banks to participate in loans arranged by domestic banks.

Banking Developments

It appears that Delaware indeed is a leader in banking change, and the results confirm that. It is reflected with equal force by legislative interest of other jurisdictions and the marketplace. Increasingly high interest rates have made the public much more critical of the product it receives. The tremendous, sudden growth of money market funds and the economic throes of the savings and loan industry reflect that new sensitivity. The financial marketplace has become perhaps the most competitive industry in the nation.

Federal legislation that would have profound influence on the banking and financial services industry has been drafted, discussed, and redrafted at length for many months. However, the various constituencies of the big banks, the brokerage firms, the small banks, the savings and loan industry and others have thwarted action, leaving the federal system to act largely in an ad hoc fashion such as by permitting banks to acquire ailing savings and loan institutions (otherwise prohibited by federal law), by permitting new activities "closely related to banking" (as required by federal regulation), or by raising the ceiling on interest paid by banks and S & Ls. There has been no substantial change in the federal banking statutes themselves as of this writing, and this has led to action on other fronts.

Participants in the marketplace have become more aggressive. Sears' acquisition of Dean Witter and Prudential's of Bache reflect a growing view that there are strong advantages in being able to provide a large variety of financial services in *one* combined entity. These new hybrids act as direct competitors to banks by providing quasi-depository services. Banks in turn have been introducing sweep accounts and working with

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Other states have also been sensitive to these demands and opportunities, as well as to what Delaware has done. Many have eliminated their interest limitations or at least have substantially raised them. While the neighboring states of Pennsylvania and Maryland have moderated their restrictions, unwillingness to go as far as Delaware has led seven of their large banks to Delaware. In contrast, Michael M. Horne, New Jersey's Banking Commissioner, recently has said:

"Although the Delaware success story may not necessarily be repeated with equally spectacular results in New Jersey, it may not be too late to enact similar legislation in our state. New Jersey has certain geographical advantages over Delaware, and because of the potential economic benefits to the state, this legislation should certainly be explored. I pledge to you that when it comes to regulatory competition between this department and the U.S. Comptroller of Currency, we will not finish in second place."

In a major step New York recently enacted legislation allowing out-of-state banks to locate in New York, provided their home state allowed similar access to New York banks. New York thus joins Maine and Alaska with "reciprocal" banking statutes. Delaware and South Dakota, however, are the only states as of this date allowing out-of-state banks into their respective states without a reciprocity requirement.

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Secretary of State Kenton is forthright on this point. "Delaware enacted the FCDA to broaden its economic base beyond the already valuable chemical and manufacturing operations in the State. It moved quickly and is now at the forefront of attractive banking jurisdictions. It has a commitment to remain there as an innovative forum which allows the financial services marketplace to compete in the best interest of the industry and the general public. The State is now looking closely at various pieces of additional legislation designed to take this intent the next step. Most prominent are provisions allowing international banking facilities in Delaware and allowing Delaware banks to undertake expanded activities under their state charters."

Drafts of such legislation and other proposals have been circulating in the banking and business communities for several months. The international banking legislation was actually introduced for discussion purposes in the General Assembly shortly before its July recess. Just weeks before, the legislature adopted the Limited Purpose Trust Company Act which resulted in E.F. Hutton's setting up its headquarters in Delaware for a national trust business.

I have described the FCDA as a success story, and despite a lack of impartiality (I participated in much of Delaware's recent bank evolution), I believe this view can be objectively sustained. Not surprisingly, Irving S. Shapiro, a principal in the FCDA and in Delaware banking over the last several years, summarizes it best. "The FCDA has accomplished several major objectives. It has changed Delaware's image nationally to one of a location desirable for business activity. Secondly, it has educated banking executives about the political, economic and labor force advantages of undertaking a substantial banking activity in the State. Not many states can duplicate the combination of Delaware's advantages. There has been 'temperature taking' in the Delaware community about proposed new banking legislation and the failure to act this year does not mean that these ideas have been abandoned."

If the Governor's words at the outset of this article set the initial goal, Shapiro's words declare it has been met. It seems clear that the ambition of many that Delaware become a First State in the financial services industry is well within reach. □

"Irving S. Shapiro puts it best. 'The FCDA has changed Delaware's image nationally to one of a location desirable for business activity, and it has educated banking executives about the political, economic and labor force advantages of a substantial banking activity in Delaware.'"

Please turn the page for Bruce Stargatt's tribute to one of Delaware's finest lawyers.

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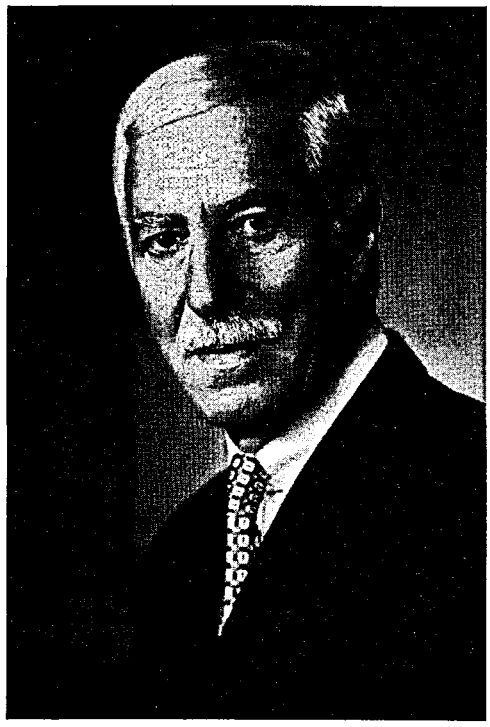

"Only in America," Hy Young would often wistfully say in his later years, borrowing from the title of Harry Golden's book to give homage to the country he loved.

Born in Kiev, Russia, in 1904. Coming to America as the child of a working, immigrant family. Settling in Delaware. Self-sacrificing parents with a reverence for education. Youthful brilliance. Graduation from University of Delaware. Penn Law School.

To become a Delaware lawyer. And what a lawyer! In the early years testing and refining his skills in court. First a trial lawyer. Then a great trial lawyer.

Offering himself up to public service. Elected Attorney General in 1951. Easing Delaware through the catharsis of desegregation. Personally prosecuting every capital case to come to his own office.

Returning to private practice. Founding his own law firm. Representing the great and small, society's darlings and its pariahs. Fearless and tough. Stylish and classy.

From the beginning a devoted family man. Married in 1934 to his heart's desire, Ann Blank. Prideful of his two sons, Stuart and Alan, their decision to practice law, their many successes, Stuart's admission to partnership in his growing firm. Warmed by the affection of his lovely daughter, Ronell. Later basking in the affection of his grandchildren.

Serving his community. President of Congregation Beth Shalom. The driving force behind the creation of the Milton and Hattie Kutz Home. Heading the Jewish Federation. Spearheading United Fund drives. Helping found Brandywine Country Club. Working as a Fellow of Brandeis University.

Serving his profession. President of the Delaware State Bar Association. Accepting without hesitation every call to duty, from Chairmanship of the Supreme Court Advisory Committee on the Uniform Commercial Code to years of service on the Board of Examiners.

Receiving the Bar's highest honors: First State Service Award. Fellowship in the American College of Trial Lawyers and International College of Trial Lawyers. Prospering in the practice of law. Limitless in philanthropy, self-tithing the fruits of his toil. Never turning aside a worthy cause.

Struck low in 1972 by the death of his beloved wife. Tearful. Bent. Straightening himself. Creating the Ann B. Young Professorship in cancer research at the University of Pennsylvania.

During his later years standing erect, with head high. Eyes once fierce, gentled by life's experience. A slender figure, just fuller than slight. Snow white hair. Trim mustache. Impeccable. Striding purposefully along Pennsylvania Avenue from the apartment building he conceived to the law firm he built.

Passing with merciful speed on the eve of his 78th birthday, May 29, 1982. Fittingly a Memorial Day weekend.

H. Albert Young. Trial Lawyer. Servant to his profession and his community. Honored, respected, and loved by his family, colleagues, and friends. Richly fulfilled by life's every measure, an ornament to his country.

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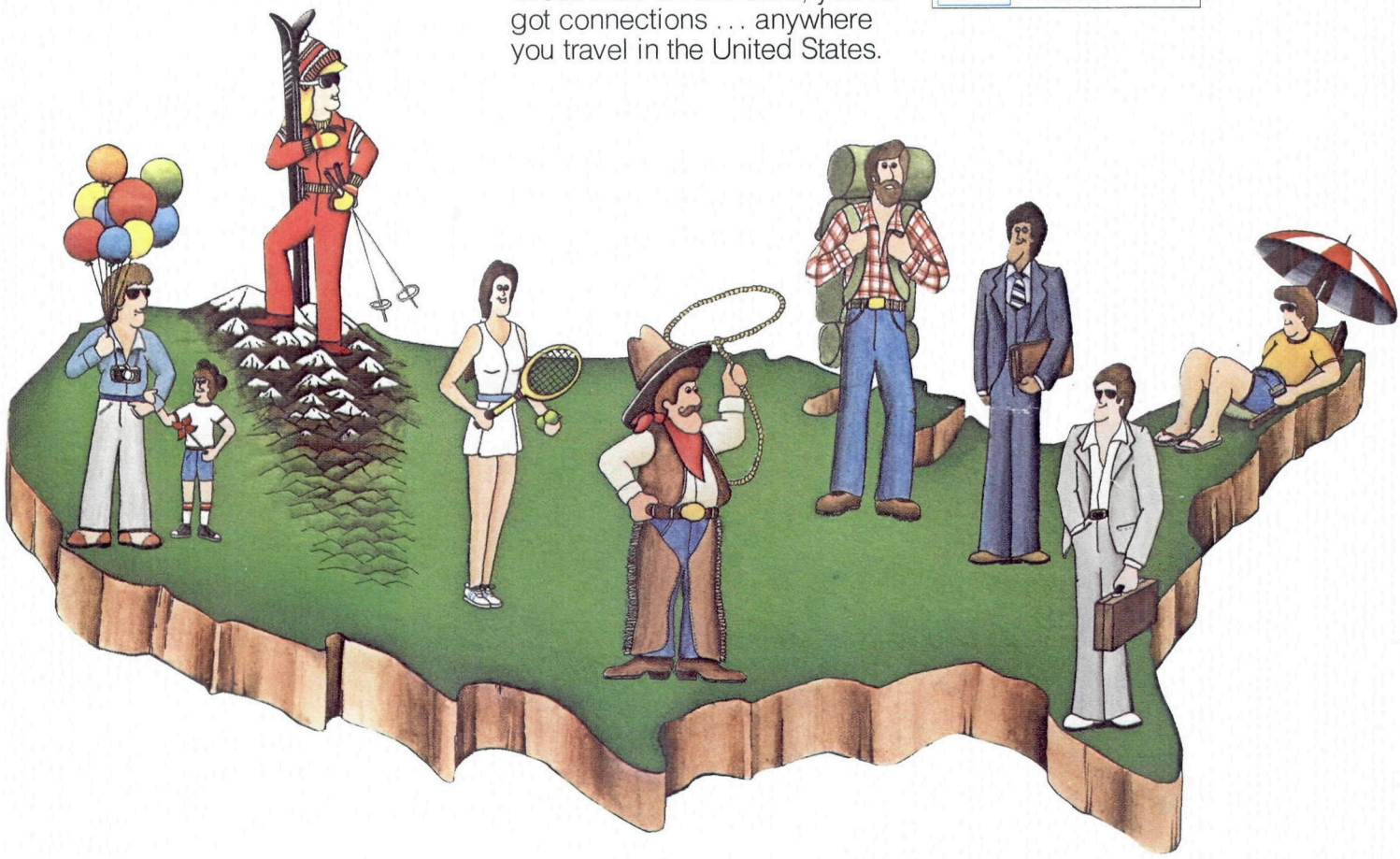

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